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The nineteenth annual meeting of the American Bar Association at Saratoga was made especially noteworthy by the presence of Lord Chief Justice Russell of England. President Moorefield Storey on calling the association to order delivered an address of unusual vigor. Many other addresses were made and papers read by prominent members of the association. But the feature of the occasion was the scholarly address of Lord Russell who took as his text the subject, peculiarly appropriate to the occasion, of "International Law." Nothing could be finer than the spirit that pervaded the address. He spoke as a lawyer to lawyers, considering the development of international law, its fundamental conceptions and the possibility of extending its scope in certain important respects. He dilated especially upon the advantages of a peaceable method for settling disputes between nations and paid a graceful compliment to the contributions to international law made by American lawyers and statesmen. "To the United States," he said, "to its judges, writers and statesmen—we largely owe the existing rules which relate to a state of peace and which affect the rights and obligations of powers which, during a state of war, are themselves at peace." Lord Russell's review of the progress that has been made towards international arbitration is very impressive. Although there have been attempts in this direction almost from the beginning of history, it is hardly a quarter of a century since these attempts have attained significant proportions. Within that period a number of influential organizations have been formed, whose members, as Lord Russell reminds us, are not vain idealists, but men of the world. They do not claim to be regenerators of mankind, nor do they promise the millennium, "but they are doing honest and useful work in making straighter and less difficult the path of intelligent progress." It has already become a common practice to introduce arbitration clauses into treaties, and in a number of cases the principle has been carried so far as to extend the agreement for arbitration to all questions in difference whatsoever.

At the close of Lord Russell's address the vast audience rose to its feet and applauded and cheered him to the echo. The election of officers of the association for the ensuing year resulted as follows. President, James M. Woolworth, Omaha; Secretary, John Hinkley, Baltimore; Treasurer, Francis Rawle, Philadelphia.

The effect of previous knowledge of a defect in a highway, on the part of one injured, who had temporarily forgotten it, as constituting contributory negligence sufficient to bar action for damages against a municipal corporation responsible for such defect is a novel question upon which the authorities were reviewed in a recent annotation appended to the case of Simonds v. City of Baraboo (Wis.), 43 Cent. L. J. 58. A later case decided by the Supreme Court of Michigan, Bonga v. Weare Township, 67 N. W. Rep. 557, sheds additional light upon the question. The point there decided was that where the driver of a vehicle, while passing over a culvert, noticed a defect therein, and drove around the same, but upon returning in the dark, ran into it, while driving rapidly, whereby the vehicle was injured, the question as to whether it was contributory negligence to forget the defect in the meantime should have been submitted to the jury; and it was error to make the determination of the driver's negligence necessarily turn upon whether he did or did not remember.

To the cases noticed in a late issue of the JOURNAL—43 Cent. L. J. 149—on the subject of the extent of the liability of a public treasurer for moneys lost without negligence on his part should be added the later case of City of Healdsburg v. Mulligan, 45 Pac. Rep. 337, decided by the Supreme Court of California. The cases commented upon in the JOURNAL were antagonistic—one contending that the bond required of an official treasurer does not extend his common law liability and make him liable for public funds lost through no want of ordinary care on his part—the other deciding in favor of a strict or absolute liability. The California court adopts the first mentioned view, holding that the common law liability of a city treasurer is not enlarged by statutes, or by a bond providing that, if he shall faithfully "perform all the duties of

such office of treasurer as required by any law," the obligation shall be void, and such treasurer is not liable for money forcibly taken from him by robbers. Beatty, C. J., dissented.

NOTES OF RECENT DECISIONS.

JUDGMENT—FICTITIOUS CAUSE—COLLUSIVE PETITION TO VACATE.—The decision of the case of *Ex parte* McKenzie, 44 N. E. Rep. 413, gave the Supreme Court of Illinois considerable trouble if we are to judge from the lengthy opinion filed, from which three of the members of the court dissented. It appeared there that after the expiration of the term at which a judgment was affirmed by the supreme court, and the lapse of the time allowed for ordering a rehearing, persons appearing as *amici curiæ* presented their petition and asked that the court should strike out, annul, and expunge from the records and reports of the court the opinion and judgment in the case affirmed, on the ground that the cause was fictitious and collusive, and the opinion and judgment were obtained by collusion and fraud practiced on the court. The petitioners were not parties to the record, were not privies to the judgment, and their property or rights or equities were not directly, necessarily, or injuriously affected by the judgment. It was held by a majority of the court, that the petition could not be maintained by mere strangers to the record.

NEGLIGENCE—PROPRIETOR OF BATHING RESORT—FAILURE TO USE PROPER PRECAUTIONS.—According to the recent decision of Brotherton v. Manhattan Beach Imp. Co., 67 N. W. Rep. 479, a company that maintains a bathing resort, and lets out its privileges to the public for hire, is bound to take such precautions for the safety of bathers as a person of ordinary prudence would take under the circumstances, and whether or not proper precautions have been taken is ordinarily a question for the jury; and consequently, when such a company was notified of the disappearance of a bather so soon after he had been seen as to warrant the inference that an immediate search in the water would have resulted in his rescue before death, and the company had no one present to watch bathers and rescue those in danger, and such agents of the company as were present failed to make any search in the water for the missing man, it is error to instruct the jury to return a verdict for the company in an action for the recovery of damages for his death.

RAILROAD COMPANY — ACCIDENT AT CROSSING — TRESPASSER.—Among the points decided by the Circuit Court of Appeals for the Seventh Circuit, in the case of Cahill v. Chicago, M. & St. P. Ry. Co., is that at a place where several thousands of persons cross the switching tracks of a railroad daily, and where no effort is made to stop them, by fencing, posting notices, or otherwise, persons attempting to cross are not mere trespassers; and the company is bound, not merely to refrain from wanton or willful injury after discovering them, but to anticipate their probable presence, and move its cars with reasonable precautions, and a proper regard to their safety; and that it is a question of fact in each case whether there has been, with the acquiescence of the railroad company, such a public and customary use of the alleged crossing as to justify the presence upon the track of the person injured. The court says:

> While it is well-settled that, under ordinary circumstances, a railroad company owes no duty to a trespasser upon its tracks, it is also true that a trespasser may not be wantonly or willfully run down, and when he is perceived to be in a position of danger, from which he is not likely to escape by his own exertions, there arises on the part of the company a duty to use all reasonable diligence not to harm him. Railway Co. v. Tartt, 12 C. C. A. 618, 64 Fed. Rep. 823, and 24 U. S. App. 489. That much is due to a decent regard for human life and limb, and, on the same principle, it must be that in places on the tracks where people are accustomed to come and go frequently in considerable numbers, and where by reason of such custom their presence upon the track is probable, and ought to be anticipated, those in charge of passing trains must use reasonable precautions to avoid injury, even to those who, in a strict sense, might be called trespassers. But, when a railroad company consents to the customary or frequent passing of people over its tracks, they cannot be deemed trespassers, and the duty is as clear as the necessity that locomotives and cars be moved with proper regard for their safety. The adjudged cases on the subject are numerous. A leading one is Barry v. Railroad Co., 92 N. Y. 289, 292, where there had been long acquiescence of the company in the crossing of its track by pedestrians, which amounted to a license and permission to all persons to cross at a point where there was only a private right to cross; and it was held that the circumstances imposed a duty upon the company, in respect to persons using the crossing,

"to exercise reasonable care in the movement of its trains." This case is reaffirmed in Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. Rep. 539, where it was held "that the defendant was not absolutely bound to ring a bell or blow a whistle, but that it was bound to give such notice or warning of the approaching train as was reasonable and proper under the circumstances." In Taylor v. Canal Co., 113 Pa. St. 162, 8 Atl. Rep. 43, after reference to the Barry Case the Supreme Court of Pennsylvania says: "The principle, clearly settled by the foregoing and many other cases that might be cited, is that when a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point, not in itself a public crossing, it owes the duty of reasonable care toward those using the crossing; and whether, in a given case, such reasonable care has been exercised, or not, is ordinarily a question for the jury, under all the evidence." In Roth v. Union Depot Co. (Wash.), 43 Pac. Rep. 641, where there is a discriminating review of cases, it is held that a company's acquiescence in the daily use of its track for travel afoot by 50 to 100 people imposes on the company a duty of ordinary diligence to avoid injury to persons using the track. In Railway Co. v. Dick (Ky.), 15 S. W. Rep. 665, involving the same question, it was said that "undoubtedly the appellee ought not to be regarded as a trespasser upon the yard of the company," because he "was crossing the tracks by the permission of the company. It had, by its acquiescence in the work hands crossing them for a long time, licensed them to do so. It was permitting such use, and it had, therefore, by its own conduct, imposed upon itself a precautionary duty, as to the appellee, when he might be crossing its tracks in going from and returning to his work." To the same effect are Railway Co. v. Wymore (Neb.), 58 N. W. Rep. 1120; Ward v. Southern Pac. Co. (Or.), 36 Pac. Rep. 166. See, also, Townley v. Railway Co., 53 Wis. 626, 11 N. W. Rep. 55; Whalen v. Railway Co., 75 Wis. 654, 44 N. W. Rep. 849; Conley v. Railway Co. (Ky.), 12 S. W. Rep. 764; Railway Co. v. Crosnoe, 72 Tex. 79, 10 S. W. Rep. 342; Railway Co. v. Meigs, 74 Ga. 857; Southerland v. Railroad Co., 106 N. C. 101, 11 S. E. Rep. 189; Frick v. Railway Co., 6 Mo. App. 435; Palmer v. Railway Co., 112 Ind. 252, 14 N. E. Rep. 70. It is, of course, a question of fact, in each case, whether there has been, with the consent or acquiescence of the railroad company in possession, such a public and customary use of the supposed crossing as to justify the presence upon the track of the person injured. Taylor v. Canal Co., *supra*; Chenery v. Railroad Co., 160 Mass. 211, 35 N. E. Rep. 554.

ATTACHMENT—WRONGFUL LEVY—DESTRUCTION OF PROPERTY BY FIRE.—In Sammis v. Sly, 44 N. E. Rep. 508, decided by the Supreme Court of Ohio, it was held that where an attachment is levied on the property of a third person under the mistaken belief that it belongs to the defendant in the attachment suit, the title of the owner is not thereby changed, unless he treat the property as abandoned to the officer or attaching creditor, and sue for its conversion, and that where in such case, no such custody is taken of the property by the officer as deprives the owner of his control over it, and it is lost by fire before the commencement of a suit for the conversion, the fire being in no way attributable to the fault of the officer or the levy of the attachment, the loss is that of the owner, and not that of the officer or attaching creditor. The court said in part:

The gist of the plaintiff's action is a conversion of his property by the defendants, not negligence in the care of it. The conversion was, at most, a technical one, a dealing with the property of the plaintiff as if it were that of the judgment debtor. The property, was not, in fact, converted. All the officer did was to place his hands on the stack, saying, as he did so, that he attached it as the property of the attachment debtor. It was then left where found. For this it will be conceded the owner, Sly, had the right to treat the levy as a conversion of his property. The effect of such suit is to abandon the property to the wrongdoer, and in consideration of this the law gives to the plaintiff a recovery of its value. But the owner whose property has been wrongfully intermeddled with is not bound to pursue this remedy. He has the election to do so, or recover the property in an action of replevin, based upon his title. Until he makes his election, by bringing a suit for conversion, the title remains in him; otherwise he could not, at his election, maintain replevin. In other words, a mere intermeddling with another's property in a way to deny his title does not of itself divest his title. He may treat it as such by commencing an action for a conversion, but until this is done the title remains in him In this case the suit for conversion was not commenced until some time after the fire, so that at the time of the fire the title to the stack of rye was in the plaintiff, and, no negligence having been imputed to the defendants as the cause of the fire, the owner of the property, the plaintiff, at the time of the fire, must bear the loss, in accordance with the maxim *Res periit domino*. True, the plaintiff says that, but for the levy, he would have threshed the rye before the fire, and that he was prevented thereby from doing so. This must be considered in connection with the undisputed facts. He was no party to the proceeding in attachment, and the levy could not, therefore, like an injunction, in anyway restrain him from exercising his rights of ownership. The actual possession not being disturbed, he had the same right and ability to take care of his property that he had before the levy; and if he failed to do so it was his own fault. The levy, as made, did not deprive him of the right nor make it unlawful for him to do so. If he were the owner of the property as claimed, he would be liable to no one for dealing with it as he pleased, notwithstanding the levy. If the property had been taken into the actual custody of the officer, and so as to deprive the owner of any control over it, a different rule of liability might apply. In such case there would be much reason for holding that, irrespective of the question of care, the officer, having wrongfully deprived the owner of the care of his property, should be liable for its loss from any cause other than the act of God or public enemies; for, in such case, but for the wrong, the loss might not have occurred. But, as between the officer and the creditor, or the debtor in the attachment suit, it seems well settled that the officer is not liable for the destruction of the property while in his custody by fire or other means, unless guilty of a want of ordinary care. Swan's Treatise, 16th ed., 291; Story, Bailm., 2d

ed., Sec. 132; Crock. Sher., 3d ed., Secs. 448, 855. This rule is placed by Story on the ground that the officer is a bailee for hire, and should not be held to a greater nor less degree of liability than is required by the common rule in such cases—ordinary diligence. But as to a third person, whose property has been wrongfully taken under the writ, the reason does not seem to apply. As to such person, he would seem to be wrongdoer, and not a bailee of any kind. But this question is left undecided, and the decision placed on the grounds before indicated—that the owner was not in fact deprived of the custody of his property, nor of the title thereto by the levy; and the fire not being referable to the levy, nor to any want of care on the part of the officer, the loss occasioned by the fire fell to the owner of the property.

NEGOTIABLE INSTRUMENT—INDORSEMENT OF DRAFT TO FICTITIOUS PERSON.—**The Supreme Court of Tennessee, in Chism v. First Nat. Bank, decides that the indorsement of a bank draft by the payee to the order of a fictitious person in good faith and believing him to be real, is not in law an indorsement to bearer, such not being the intention of the indorsee; and the indorsement of the name of the fictitious indorsee by a third person without authority is a forgery and does not protect the bank in payment of the draft. The court says:**

Two defenses are made: First, that complainants were guilty of such carelessness in their dealings with Weems as to estop them from setting up the present claim; second, that the indorsement by Chism, Churchill & Co. of this draft to a fictitious indorsee was in law an indorsement to bearer, and the result was that its payment through the usual channels of trade, without notice of the alleged defect, discharged the drawee.

As to the first of these grounds, it is sufficient to say that the record fails to show any recklessness or carelessness upon the part of complainants in this transaction to prevent a recovery, if for any sound reason this suit is maintainable. It is the second ground, however, upon which the defendants rest largely their defense to this claim. What is the effect of indorsing a bill to a fictitious person, the indorser not knowing that the indorsee was fictitious, but, on the other hand, believing him to be a real person, is a question of first impression in this State. There is no doubt it is true, as a general proposition, that the holder of commercial paper, payable to order, must trace his title through a genuine indorsement, including that of the payee. 2 Rand. Com. Paper, § 988; 1 Daniel, Neg. Inst. § 731; 1 Edw. Bills & N. § 519; Mead v. Young, 4 Term R. 28-30. And it is equally true that where a banker pays a draft or check drawn upon him, he, at his peril, pays it to any one but the payee, or to one who is able to trace his title back to the payee through genuine indorsements. The mere possession of the check or bill under apparent title does not necessarily imply the right to demand or receive payment, and when it is paid to such holder the drawer has put upon him the risk of seeing that the apparent is the real title to the paper; for the banker holds the funds of his depositor under an obligation to pay them to him or to his order, and if he pays them otherwise he cannot treat such a payment as a discharge of his liability. Shipman v. Bank, 126 N. Y. 318, 27 N. E. Rep. 371; Robarts v. Tucker, 16 Q. B. 575; Dodge v. Bank, 30 Ohio St. 1. It is otherwise as to his payment of a check or bill payable to bearer. In such a case, in the absence of knowledge that the party presenting the paper is wrongfully in possession of it, he can safely pay, because in so doing he is complying with the positive demand of his depositor. Tied. Com. Paper, § 312. And it is insisted for the defense that this was the legal effect of the indorsement by Chism, Churchill & Co. to Hamilton, the fictitious indorser. It seems from a note to Bayles, Bills, p. 79, that the controversy over the effect of indorsement of bills to fictitious persons grew out of the bankruptcy of Linsay & Co. and Gibson & Co., who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. A great many cases grew out of these indorsements in the various courts of England, one of which (Minet v. Gibson, 3 Term R. 481) was carried to the house of lords. 1 H. Bl. 569. Mr. Chitty in his work on Bills (page 178), says: "The result of the discussion seems to be that a bill payable to a fictitious person or his order is, in effect, a bill payable to bearer, and may be declared on as such in favor of a *bona fide* holder ignorant of the fact against all the parties knowing that the payee was a fictitious person." In other words, whether such a bill was collectible by the holder, as if payable to bearer, depended upon the fact that the party against whom it was sought to be enforced, at the time he assumed liability upon it, knew that the payee was fictitious. Where he possessed such knowledge he was estopped from saying to a *bona fide* holder that he was not bound; otherwise he would be a party to the circulation of commercial paper, apparently good, yet with an inherent vice which rendered it worthless, at least as to him, though it fell into the hands of an innocent purchaser. Subsequently the bill of exchange act of 1882 was passed, the effect of which was in fact that a bill might be treated as payable to bearer when the party named as payee was a real person, but has not and was not intended by the drawer to have any right arising out of it. Bank v. Vagliano (1891) App. Cas. 107. In this country, among the text writers, Mr. Daniel states the rule as general, and says that: "In the case of a note payable to a fictitious person it appears to be well settled that any *bona fide* holder may recover on it against the maker as upon a note payable to bearer. It will be no defense against such *bona fide* holder for the maker to set up that he did not know the payee to be fictitious." Mr. Daniel rests the rule upon the ground of estoppel, but Mr. Randolph, in his work on Commercial Paper (volume 1, § 164, note 4), suggests that the cases cited by him to support his text "apply this rule only when the maker has by his words or conduct raised any estoppel against himself," and this latter author fails in his text, as we understand it, to give the sanction of his approval to the rule as announced by Mr. Daniel.

The questions presented in this case have arisen and been discussed in but few of the American courts, and the conclusions reached by them have been variant. Blodgett v. Jackson, 40 N. H. 21, relied upon by the defendants in this case, we think is not authority for the rule contended for by them. There a note payable to a firm of Whitney, Shaw, Lent & Hawes was in the possession of Lent, and was sold and transferred by him for value to the plaintiff in the action. The defendant, the maker of the note, denied the genuineness of the indorsement. To the is-

sue made by this denial the court said: "The bare possession of this note by this person was competent evidence to be submitted to the jury, that he (the party transferring) was the Lent named in the note, and of course a member of the firm, and authorized to indorse it in the manner he did." "Here was a note which the evidence tends to show was genuine, payable to Whitney, Shaw, Lent & Hawes; a thing of value, and likely to be in the possession of the owners. Such possession therefore raised a presumption of ownership." Kohn v. Watkins, 26 Kan. 691, does raise the precise question here presented, and is a direct authority for the contention of defendants. In that case it was held that the drawer of a bill, who makes it payable to a fictitious person, and transmits it to a third person for delivery to the payee, is bound to a *bona fide* purchaser from that third party who indorses it with the name of the payee, though the drawer, when he issued the bill, believed that the payee was a real person, and intended it to be delivered to him only upon the receipt of a valuable consideration from him. The court rested its opinion on the text of Mr. Daniel, which has already been adverted to, and certain cases which were regarded as authorities, to sustain the rule adopted. Lane v. Krekle, 22 Iowa, 399, one of these cases, while it contains a *dictum* which is in harmony with the conclusions reached by the court citing it, was confessedly not an authority on the real point in controversy, as in that case the note sued on was payable to bearer. Another of these cases is Phillips v. Imthurn, 114 E. C. L. 694. There the signature of the drawer, as well as the indorsement, was a forgery, but the acceptor was held liable upon the ground that he had misled the holder. The ground of the decision, as stated by Keating, J., in the final disposition of this case reported in L. R. 1 C. P. 463-372, was that: "Upon the facts stated in this special case, it was not competent for the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching, by his acceptance of it, the authenticity of the drawing." Forbes v. Espy, 21 Ohio St. 474, was also relied upon in Kohn v. Watkins, *supra*. In that case E. & Co. issued a bill on New York to the order of C. H. & Co., its purchasers, who indorsed it to one Charles Clark, whose real name, however, was Maro. This was not a case of a fictitious payee, but of a man with an alias, or an assumed named, taking title in his assumed, rather than his real, name. So the court held that the indorsement and delivery of this bill to Clark must be regarded as an affirmation to all persons not otherwise informed that there was such a person as Charles Clark, and that Maro was that person. We do not think, upon these facts that this case can be said to support the general rule to which it was cited, and this was evidently the view of the Supreme Court of Ohio in a case to be referred to at length hereafter. Upon the other hand, we have at least two well considered cases which, in effect, adopt the English rule, to-wit: that only such paper as is issued to a fictitious payee or indorsee by the party sought to be bound, with full knowledge of the fact shall be treated as payable to bearer. In one of these cases—that of Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. Rep. 866, after a careful review of the authorities, it is said: "If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other—that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement." The case of Shipman v. Bank, 126 N. Y. 318, 27 N. E. Rep. 371, involved over $200,000 was argued by counsel of research and ability, and was determined by a court of deserved reputation. In that case it appeared that the plaintiffs were depositors in the defendant bank. They drew checks for large sums to fictitious payees, supposing them to be real persons. These checks were given to a trusted employee, to be turned over to the respective payees. Instead, however, this employee endorsed the names of the payees upon them, and had them presented to the drawee, when they were paid without inquiry or suspicion of the genuineness of the indorsements. Suit having been instituted by the drawer to recover the sums so paid out, it was resisted upon the ground that these checks were in law payable to bearer. The court, however, speaking through O'Brien, J., say: "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer, unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." We think the rule thus limited is reasonable, while to eliminate the element of knowledge or intent would leave it harsh and unreasonable. In addition, with this limitation, the law of negotiable paper, so far as it involves the question of forgery, is consistent; for it is universally conceded that the payment of a check or a bill drawn to the order of a real person upon a forged indorsement of the payee's name will not protect. In such a case the banker is still liable to the owner for the funds in hand as though no payment had been made. 3 Rand. Com. Paper, § 1739. And this would be so even if the forger should personate an intended payee of the same name. Com. v. Foster, 114 Mass. 311. Then, in a case where the drawer has been guilty of no wrong, but innocently issues or indorses his check or bill to a fictitious person, believing him to be real, and a third party without authority writes the name of this fictitious payee or indorsee upon it, and by this fraud succeeds in collecting it, why should the drawee, by payment of such indorsement, discharge himself from liability to the drawer? The writing of the name of the non-existing payee under such conditions is forgery at common law (4 Bl. Comm. p. 247; 2 Whart. Cr. Law, § 653), and under Mill & V. Code, § 5492. In the present case, without fault on the part of the complainants, the drawee has paid upon a forged indorsement, to a party not entitled to collect it, a bill of which Chism, Churchill & Co., were owners, and which no one had a right to collect save upon their order, and now has it, and declines to account for its value. Under these circumstances, we think the chancellor was right in holding the drawee liable, and we therefore affirm his decree.

PROCEEDINGS TO OBTAIN SICK AND DISTRESS BENEFITS OF SOCIETIES AND FRATERNITIES.

1. *Binding Effect of By-Laws, etc.*—It may be stated, in general terms, that mem-

bers of unincorporated voluntary associations are bound by their constitution and by-laws. Yet such binding effect is to be understood in a certain limited sense. The adjudications differ somewhat as to what these limits are. Many cases declare the rule to be that the constitution, by-laws, etc., are a law unto the members.[1] A more accurate statement of the doctrine with full illustrations, will be found in 42 CENTRAL LAW JOURNAL, p. 175, *et seq.*[2] Where the society is duly incorporated, regulations made in accordance with the charter and laws are binding on the member.

2. *Society Regulations.*—The authorities agree that these societies may make reasonable regulations as to the form and sufficiency of the application for relief, the appointment of sick committees, etc., to examine and determine claims for benefits and that such benefits will not be granted until such determination is made,[3] that the applicant shall furnish a physician's certificate, stating the nature and extent of his illness,[4] and that such certificate shall be furnished weekly. Such requirements are precedent to the right to receive benefits.[5] It is obvious that there should be some method of determining the question as to when relief should be given or denied,[6] to thwart imposition, either by feigned or trivial sickness, or by disabilities produced by causes not entitling the claimant to relief. The regulations respecting sick committees, frequent visits to the applicant for relief, etc., are held to be reasonable and valid. When the claimant cannot be reached personally the society may provide that full evidence of the cause, nature and duration of the sickness or disability shall be furnished.[7] So, in event of dispute, benefits may be withheld until such dispute may be settled by certain officers of the association.[8] Thus, where the rule is to refer the sick claim to the trustees for examination and report, no action can be taken until such officers have been given an opportunity to act.[9]

3. *Amendments Exacting Additional Requirements* on the part of the society have been sustain in the case of a voluntary unincorporated association. It is held that this may be done without notice, where the laws of the societies do not require it. In accordance with this principle an amendment was sustained which required all afflicted members to notify the society of their sickness and furnish a physician's certificate, etc., as against a member who had no notice of the new requirements, and his non-compliance therewith was deemed sufficient to deprive him of the relief.[10] Yet it must be remembered that this was an unincorporated association. The decision proceeds upon the ground that by reason of the want of visitorial power on the part of the court, the reasonableness of the amendment could not be considered. The court confined the examination to the question as to whether or not the amendment had been adopted in the manner previously agreed upon by the members; that is, in accordance with the society's regulations.[11]

4. *Conclusiveness of Society's Decision.*—While all of the above regulations are uniformly sustained, the adjudications present a decided conflict as to the validity of rules establishing judicatories within the society to pass upon claims for benefits and making their decisions final and conclusive and prohibiting members from pursuing their ordinary legal remedies by appealing to the courts, as in every other instance in the assertion and protection of their property rights they are permitted to do.[12] However, the

1 Grosvenor v. United Society, 118 Mass. 90; Thompson v. Adams, 7 Week. N. C. 281; Moxey's Appeal, 9 Week. N. C. 441.

2 See article on By-laws of Voluntary Assns., 23 Am. Law Rev. 890; note to Otto v. Journeyman T. P. & B. U., 7 Am. St. Rep. 1600.

3 Robinson v. Irish American Benev. Soc., 67 Cal. 135, 7 Pac. Rep. 435, 14 Ins. L. J. 790.

4 Harrington v. W. Ben. Soc., 70 Ga. 340, 27 Alb. L. J. 438.

5 Dolan v. Court Good Samaritan, 128 Mass. 437.

6 Van Poucke v. St. Vincent de Paul Soc., 63 Mich. 378, 29 N. W. Rep. 863, 6 Western Rep. 32.

7 Breneman v. Franklin B. Assn., 3 Watts & S. (Pa.), 218, 220; Fritz v. Munch, 62 How. Pr. (N. Y.) 69, 74, 75.

8 *Ex parte* Woolridge, 1 B. & S. 844; St. Mary's Ben. Soc. v. Burford, 70 Pa. St. 321.

9 Robinson v. Irish-American Ben. Soc., 67 Cal. 135, 7 Pac. Rep. 435, 14 Ins. L. J. 790.

10 McCabe v. Father Matthew's Soc., 24 Hun (N. Y.) 149, 152.

11 Kehlenbeck v. Logman, 10 Daly (N. Y.), 447.

12 White v. Brownell, 2 Daly, 329, 4 Abb. Pr. (N. S.) 162; Singerly v. Johnson (Pa.), 3 Week. N. C. 541; Scott v. Avery, 5 H. L. 811; Leech v. Harris, 2 Brews. (Pa.) 571; Heath v. N. Y. Gold Exch., 38 How. Pr. 168, 7 Abb. Pr. (N. S.) 255; State v. Merchants Exch., 2 Mo. App. 36; Harrington v. W. Ben. Assn., 70 Ga. 340, 27 Alb. L. J. 489; Lafond v. Deems, 81 N. Y. 507; Dolan v. Court Good Samaritan, 128 Mass. 437; State v. Chamber of Commerce, 20 Wis. 63; Player v. Archer, 1 Sid. 111; Ballard v. Bennet, 2 Burr, 778. See Bacon on Ben. Soc., § 94; Niblack on Mut. Ben. Soc., §§ 130, 131.

decisions are practically unanimous in holding that in seeking benefits the member is required to exhaust the remedies provided for in the society before applying to the courts;[13] but in the absence of any inhibition in the society's rules, or where no provisions exist for appeals to superior bodies within the organization the member may pursue his ordinary legal remedy.[14] So where the society refuses or neglects to act for the mere purpose of harassing the member, which practically amounts to a denial of justice, or acts in bad faith, action may be commenced in the courts at once.[15] So where the officers act without authority, their judgment is void, and like a void judgment of a court of law, it is of no avail, hence an appeal to the society's tribunal is not a necessary condition to maintain action.[16] And it was said in one case that in extreme probability of fair action, or that the appellate tribunal would reach a different conclusion, no appeal in the society is necessary.[17] Many cases hold that the society may prohibit actions at law altogether and make its decisions final, and that where the society's tribunals act in good faith with impartiality and without fraud, their determination should be deemed conclusive.[18] Such regulations are sustained upon the ground that these societies are private beneficial institutions, operating upon the members only who, by reasons of policy or convenience affecting their welfare and perhaps their existence, adopt rules for their government, to be administered by themselves, to which every person who becomes a member consents, or because they require the surrender of no rights that an individual may not waive, and are binding only so long as he chooses to recognize their authority.[19] But where a society's rights in this respect are conceded, the power to finally reject claims must be given in the clearest and most explicit terms, for it is never presumed.[20] On the other hand, it is held that these societies may prescribe rules as to procedure in enforcing claims, and may require appeals to superior bodies before instituting suit, but that they cannot entirely take away the right to invoke the aid of courts in asserting rights existing in favor of their members arising from contract.[21] "To create judicial tribunals," remarked the Court of Appeals of New York, "is one of the functions of the sovereign power; and although parties may make such tribunals in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules."[22] The Supreme Court of Indiana declares that, "it is not within the power of individuals to create judicial tribunals for the final or conclusive settlement of controversies. * * * It is to be noted that agreements to submit a matter to arbitration are valid when made after the specific controversy has actually arisen and not when made in advance, certainly not when the agreement provides that one of the interested parties shall be sole arbitrator."[23] "Every citizen," says the Supreme Court of the United States, "is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life, or his freedom, or his substantial right. * * * He cannot bind himself in advance by an agreement which may be specifically enforced, thus to forfeit

[13] Karcher v. Sup. Lodge Knights of Honor, 137 Mass. 362, 19 Cent. L. J. 152; Chamberlain v. Lincoln, 129 Mass. 70; Grosvener v. United Soc. of Believers, 118 Mass. 78; Dolan v. Court Good Samaritan, 128 Mass. 487; McAlees v. Order Iron Hall (Pa.), 13 Atl. Rep. 775, 2 Cent. Rep. 415, 17 Ins. L. J. 832; Grant v. Langstoff, 3 Ill. App. 128; Oliver v. Hopkins, 144 Mass. 175.

[14] Smith v. Society, 12 Phila. 380; Dolan v. Court Good Samaritan, 128 Mass. 487; Cartan v. Father Matthew's Soc., 3 Daly (N. Y.), 20; Kentucky Lodge v. White, 5 Ky. Law Rep. 418; Olery v. Brown, 51 How. Pr. (N. Y.) 92, 94.

[15] Carlen v. Drury, 1 Ves. & B. 154, 159.

[16] Hall v. Sup. Lodge Knight of Honor, 24 Fed. Rep. 60.

[17] Loubat v. LeRoy, 40 Hun (N. Y.), 546.

[18] Fritz v. Munck, 62 How. Pr. (N. Y.) 69, 74, 75; Van Foucke v. St. Vincent de Paul Soc., 63 Mich. 378, 29 N. W. Rep. 863, 6 Western Rep. 32; McAlees v. Order of Iron Hall (Pa.), 3 Atl. Rep. 755, 12 Cent. Rep. 415, 17 Ins. L. J. 832; Cincinnati Lodge v. Littlebury, 6 Weekly Law Bul. (Ohio) 237; Mohawk Lodge v. Wentworth, 4 Weekly Law Bul. (Ohio) 513; Wollsey v. Independent, etc., 61 Iowa, 492, 13 Ins. L. J. 68; Commonwealth v. Union League, 135 Pa. St. 301, 20 Am. St. Rep. 870; Canfield v. Knights of Macabees, 87 Mich. 628, 24 Am. St. Rep. 186; Poultney v. Bachman, 31 Hun, 49, 54; Rood v. Assn., 31 Fed. Rep. 62.

[19] Anacosta Tribe of Red Men v. Murbach, 13 Ind. 91, 94, 71 Am. Dec. 628; Black and White Smith Soc. v. Vandyke, 2 Wharton (Pa.), 309, 30 Am. Dec. 263; Torman v. Howard Ben. Assn., 4 Pa. St. 519; Austin v. Searing, 69 Am. Dec. 671-678, and note.

[20] Albert v. Order of Chosen Friends, 34 Fed. Rep. 721; Bauer v. Sampson Lodge, etc., 102 Ind. 262; Olery v. Brown, 51 How. Pr. (N. Y.) 92, 94.

[21] Bauer v. Sampson Lodge, etc., 102 Ind. 262; Supreme Lodge v. Garrings, 104 Ind. 133; Sweeney v. Ben. Soc., 14 Week. N. C. (Pa.) 466, 458.

[22] Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665, note pages 671-678.

[23] Bauer v. Sampson Lodge, etc., 102 Ind. 262, 269; Kisler v. I. R. R. Co., 88 Ind. 460; Mentz v. Armenia Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80; Wood v. Humphrey, 114 Mass. 185.

his rights at all times and on all occasions, whenever the case may be presented."[24] The Supreme Court of Maine says that, "the law and not the contract prescribes the remedy, and the parties have no more right to enter into a stipulation against a resort to the courts for their remedy in a given case than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts they are void."[25]

5. *Right of Action.*—It has thus been seen that, according to the doctrine of many cases, the member's right to apply to the court for relief may not be materially restricted, and that according to the doctrine of others, in asserting his claim to benefits, he must first exhaust the remedies provided for by the society, but that in the absence of provisions in this respect he may bring his action at once. There are two early Pennsylvania cases which are frequently cited as sustaining the rule that an action is not the proper remedy, but it is believed, that they are not authorities to this point, although the *dicta* of one of the cases seems to go to this extent. In Vandyke's Case[26] the question was not presented in the record. The member had been expelled by the society. He then sued the society for benefits which accrued, as he claimed, after the expulsion, and the question really decided was that he could not, in such action, collaterally attack the legality of the expulsion. However, Gibson, C. J., speaking for the court, said: "Even were there not a sentence in the way, the payment of stipendiary allowance could not be enforced by action. The society never consented to expose itself to the costs and vexation of an action for every weekly pittance that might be in arrear. For open disregard of the prescribed form of procedure the remedy would be by *mandamus* to the proper organ. * * * The remedy by action is therefore misconceived." In Torain's Case,[27] which was an action to recover six week's benefits, where the plea was non-*assumpsit*, the trial court thought that the *dictum* of Vandyke's case governed, but upon appeal, the supreme court decided it upon another point, the lower court's ruling, denying the form of procedure, not being considered, although this was the only question discussed by counsel. In a later Pennsylvania case, arising in the Philadelphia court of common pleas, an action was allowed for benefits, where there was no method provided in the society for the recovery of denied claims, the court holding that above cases had not the force of "*stare decisis.*"[28]

6. *Against whom Action is to be Brought.*—Where the society is regularly incorporated, of course, the action is to be brought against it, but in unincorporated voluntary associations, the question as to who is liable is not so clear. It is said that in the latter societies, except where by statute suit is permitted in the name assumed by the association, the action is against the individuals.[29] In New York, by virtue of a statutory provision, the action is properly brought against the society's president or treasurer,[30] and where the society lacks both of these officers, the action may be against its chief officer.[31] It is said that at common law, unincorporated societies are in respect to their rights and liabilities, merely partnerships.[32] Hence, suits against such associations cannot at common law, be maintained in the name of the organization, nor in the name of its agents or officers,[33] but actions must be brought and maintained in the names of all the members.[34] This is the rule with reference to partnerships.[35] It is held that by

[24] Home Ins. Co. v. Morse, 20 Wall. 245; Barron v. Burnside, 121 U. S. 186.

[25] Stephenson v. Ins. Co., 54 Me. 70.

[26] Black and White Smith Soc. v. Vandyke, 2 Whart. (Pa.) 313.

[27] Toram v. Howard Ben. Soc., 4 Pa. St. 519.

[28] Smith v. Society, 12 Phila. 380.

[29] Mohawk Lodge v. Wentworth, 4 Week. L. Bul. (Ohio) 513.

[30] Bridenbecker v. Hoard, 32 How. Pr. 297; Walter v. Thomas, 42 How. Pr. 338; Tibbetts v. Blood, 21 Barb. (N. Y.) 650; Dewitt v. Chandler, 11 App. Pr. 459; Olery v. Brown, 51 How. Pr. 92; Fritz v. Munck, 62 How. Pr. 69.

[31] Hathaway v. N. Y. Mining Exch., 31 Hun (N. Y.), 775. See Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; Llyod v. Loaring, 6 Ves. 773.

[32] Dicey on Parties, 149.

[33] Curd v. Wallace, 7 Dana (Ky.), 190, 32 Am. Dec. 85; Detroit Schuetzen Bund v. Detroit Agitations Verein, 44 Mich. 313, 38 Am. Rep. 270.

[34] Williams v. Bank of Michigan, 7 Wend. 542; Sullivan v. Campbell, 2 Hall, 271; Pipe v. Bateman, 1 Iowa, 369; Beaumont v. Meredith, 3 Ves. 15; Pierce v. Piper, 17 Ves. 15; Babb v. Reed, 5 Rawle, 159; Park v. Spaulding, 10 Hun (N. Y.), 131; Ebbinghausen v. North Club, 4 Abb. N. C. 300; Koehler v. Brown, 2 Daly, 78; Wood v. Wood, L. R. 9 Exch. 190, 10 Eng. Rep. (Moak), 572; Ellison v. Ringgold, 2 Jacob & W. 503; Brown v. Dale, L. R. 9 Ch. Div. 78, 25 Eng. R. (Moak), 776; Gorman v. Russell, 14 Cal. 532, 18 Cal. 688; Collyer on Part., Sec. 30.

[35] Teed v. Elwothy, 14 East. 210.

virtue of a common interest, new members of an unincorporated society are permitted to join in an action with respect to matters relating to such interests.[36] In one case it was held that the members being parties *inter se* were liable to one of their members for sick benefits where the relief was exclusively confined to their new members, and where the articles of association contemplated no charitable object.[37] But whether the members may be held liable as partners in all cases seems undetermined.[38] Many decisions hold that they cannot.[39] It has been held that the members of an unincorporated lodge of Odd Fellows were not liable to an action at law for the recovery of funeral benefits by the next of kin of a deceased member, under the constitution and by-law which provide that "in case of the death of a brother, there shall be paid to the nearest of kin of such brother a sum to defray the expenses of his funeral, which shall be paid over without delay."[40]

7. *Pleading and Practice.*—To recover benefits by suit, the petition or declaration must allege how the obligation on the part of the society to pay the benefits arises, that is, what rules and regulations exist, and that the plaintiff has fully complied with these. Hence, an allegation, claiming a balance alleged to be due during a particular sickness, at the rate of so much a week, "the sum paid by said society to the sick of said society" is insufficient.[41] Likewise an allegation that, "it is a rule of said association that every member in good standing shall be entitled to" a certain sum per week, is insufficient to show a binding legal obligation on the part of the association to pay its members such sum.[42] So an allegation stating that a by-law of the association "every member in good standing when sick is entitled," etc., is insufficient for failing to allege that such by-law was in force at the time of plaintiff's sickness.[43] In an action to recover these benefits the burden of proof is upon the plaintiff to establish the by-law, rule or custom, rendering the society liable.[44] Where the regulation is that "upon application to the stewards of the society," benefits shall be allowed in a proper case, such benefits begin to run from the date of the application, and not from the date of the sickness or disability.[45] However, this question of course, is dependent upon the proper construction to be given the rules of the given organization. As has already been stated, to recover benefits, a compliance with the society's rules appertaining thereto is necessary;[46] however, a substantial compliance is all that is required. Thus, where the rules are that each sick member shall send to the society "every week during his sickness" a certificate signed by a qualified physician, stating his illness, etc., before he shall be entitled to a weekly allowance, a member upon being sick, sent to the society the proper certificate, but which did not describe the signing physician as a doctor, yet accompanying it was a letter from the member, in which he referred to the "doctor's certificate," show a sufficient compliance to entitle the member to recover the allowance for the week that the certificate was sent, but nothing was allowed him for the subsequent period of his sickness, as he failed to give an excuse for not sending the weekly certificate.[47] However, the court would not consider what might be the effect if he had been prevented by act of God, rendering him incapable of sending the certificate weekly. But probably this would not have been a sufficient legal excuse, for it was not a matter that must necessarily have been done personally by the member, as it could have been done by another for him. Doubtless the construction of the rules of life insurance companies and benefit societies, which generally refuses to admit this as an

[36] Mears v. Moulton, 30 Md. 142.
[37] Pritchett v. Schafer (Pa.), 2 Week. N. C. 317.
[38] Cullen v. Duke of Queensburry, 1 Bro. Ch. Ca. 103; Lloyd v. Loaring, 6 Ves. 773; Cockburn v. Thompson, 16 Ves. 321; Hess v. Wertz, 4 L. & R. 356; Witner v. Schlater, 2 Rawle, 359; Ridgely v. Dobson, 3 W. & S. 118.
[39] Waller v. Thomas, 42 How. Pr. 344; Lafond v. Deems, 81 N. Y. 514; Fleming v. Hector, 2 M. & W. Caldicott v. Griffiths, 22 Eng. L. & Eq. 527; White v. Brownell, Abb. Pr. (N. S.) 318, 325, 4 Abb. Pr. 169, 2 Daly, 355; Olery v. Brown, 51 How. Pr. 92; Ash v. Genl., 97 Pa. St. 493, 39 Am. Rep. 816. See, also, Hirschl on Fraternities, etc., Sec. 6; Bac. on Ben. Soc., Sec. 112, *et seq.* See note to Phipps v. Jones, 59 Am. Dec. pp. 711, 718.
[40] Payne v. Snow, 12 Cush. (Mass.) 443, 59 Am. Dec. 200.
[41] Benefit Soc. v. White, 30 N. J. L. 313.
[42] Irish Catholic Ben. Assn. v. O'Shaughnessy, 76 Ind. 191.
[43] Irish Catholic Ben. Assn. v. O'Shaughnessy, 76 Ind. 191.
[44] Mullally v. Irish Am. Ben. Soc. (Cal.), 6 Pac. Rep. 78.
[45] Breneman v. Franklin Benef. Assn., 3 Watts. & S. (Pa.) 218.
[46] Kehlenbeck v. Logman, 10 Daly (N. Y.), 447.
[47] Dolan v. Court Good Samaritan, 128 Mass. 437.

excuse for failure to pay premiums and assessments within the specified time, is applicable.

St. Louis, Mo. EUGENE MCQUILLIN.

ACTION FOR INJURIES TO LAND — VENUE.

LITTLE v. CHICAGO, ST. P., M. & O. RY. CO.

Supreme Court of Minnesota, June 8, 1896.

1. *Trespass Quare Clausum Fregit—Venue.*—An action of trespass *quare clausum fregit* may be brought in another State from that in which the land lies.

2. *Application of State Statute.*—The action of trespass *quare clausum fregit* is changed when the land lies without the State from a local to a transitory action.

MITCHELL, J.: This action was brought to recover damages for injuries to real estate situated in Wisconsin, caused by the negligence of the defendant. The question presented is, can the courts of this State take cognizance of actions to recover damages to real estate lying without the State; in other words, is such an action local or transitory in its nature? The history of the progress of the English common law respecting the locality of actions will aid in determining how this question ought to be decided on principle. Originally, all actions were local. This arose out of the constitution of the old jury, who were but witnesses to prove or disprove the allegations of the parties, and hence every case had to be tried by a jury of the vicinage, who were presumed to have personal knowledge of the parties as well as of the facts. But, as circumstances and conditions changed, the courts modified the rule in fact, although not in form. For that purpose they invented a fiction by which a party was permitted to allege, under a *videlicet*, that the place where the contract was made or the transaction occurred was in any county in England. The courts took upon themselves to determine when this fictitious averment should and when it should not be traversable. They would hold it not traversable for the purpose of defeating an action it was invented to sustain, but always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction. Those actions in which it was held not traversable came to be known as transitory, and those in which it was held traversable as local, actions. Actions for personal torts, wherever committed, and upon contracts (including those respecting lands), wherever executed, were deemed transitory, and might be brought wherever the defendant could be found. As respects actions for injuries to real property, we cannot discover that it was definitely settled in England to which class they belonged prior to the American Revolution. As late as 1774, in the leading case of Mostyn v. Fabrigas, 1 Cowp. 161, 2 Smith, Lead. Cas. Eq. 916, Lord Mansfield, who did more than any other jurist to brush away those mere technicalities which had so long obstructed the course of justice, referred to two cases in which he had held that actions would lie in England for injuries to real estate situated abroad. In that same case he said: "Can it be doubted that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject, where the whole that is prayed is a reparation in damages or satisfaction to be made by process against the person or his effects within the jurisdiction of the court." While all that is there said as to actions for injuries to real property is *obiter*, yet it clearly indicates the views of that great jurist on the subject. And we cannot discover that it was fully settled in England that actions for injuries to lands were local until the decision of Doulson v. Matthews, 4 Term R. 503, in 1792—16 years after the declaration of American independence. The courts of England seem to have finally settled down upon the rule that an action is transitory where the transaction on which it is founded might have taken place anywhere; but is local when the transaction is necessarily local—that is, could only have happened in a particular place. As an injury to land can only be committed where the land lies, it followed that, according to this test, actions for such injuries were held to be local. As the distinction between local and transitory venues was abolished by the judicature act of 1873, we infer that actions for injuries to lands lying abroad may now be maintained in England. It is somewhat surprising that the American courts have generally given more weight to the English decisions on the subject rendered after the Revolution than to those rendered before, and hence have almost universally held that actions for injuries to lands are local. In the leading case of Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411, which has done more than any other to mold the law on the subject in this country, Chief Justice Marshall argued against the rule, showing that it was merely technical, founded on no sound principle, and often defeated justice; but concluded that it was so thoroughly established by authority that he was not at liberty to disregard it. But so unsatisfactory and unreasonable is the rule that since that time it has, in a number of States, been changed by statute, and in others the courts have frequently evaded it by metaphysical distinctions in order to prevent a miscarriage of justice. Chief Justice Marshall's own State of Virginia changed the rule by statute as early as 1819. Some courts have made a subtle distinction between faults of omission and of commission. Thus in Titus v. Inhabitants of Frankfort, 15 Me. 89, which was an action against a town for damages sustained by reason of defects in a highway, it was held that, while highways must be local, the neglect of the defendant to do its duty, being a mere nonfeasance, was transitory. It has also been held

that where trespass upon land is followed by the asportation of timber severed from the land, if the plaintiff waives the original trespass, and sues simply for the conversion of the property so carried away, the action would become transitory. Telegraph Co. v. Middleton, 80 N. Y. 408; Whidden v. Seelye, 40 Me. 247. Again, it has been sometimes held that an action for injuries to real estate is transitory where the gravamen of the action is negligence—as for negligently setting fire to the plaintiff's premises. Home Ins. Co. v. Pennsylvania R. Co., 11 Hun, 182; Barney v. Burstenbinder, 7 Lans. 210. In Ohio the rule has been repudiated, at least as to causes of action arising within the State, as being wholly unsuited to their condition, because under their judicial system it would result in many cases in a total denial of justice. Genin v. Grier, 10 Ohio, 209. Almost every court or judge who has ever discussed the question has criticised or condemned the rule as technical, wrong on principle, and often resulting in a total denial of justice, and yet have considered themselves bound to adhere to it under the doctrine of *stare decisis*. An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real.

Every argument founded on practical considerations against entertaining jurisdiction of actions for injuries to lands lying in another State could be urged as to actions on contracts executed, or for personal torts committed, out of the State, at least where the subject-matter of the transaction is not within the State. Take, for example, personal actions on contracts respecting lands which are conceded to be transitory. An investigation of title, of boundaries, etc., may be desirable, and often would be essential to the determination of the case, yet such considerations have never been held to render the actions local. Another serious objection to the rule is that under it a party may have a clear, legal right without a remedy where the wrongdoer cannot be found, and has no property, within the State where the land is situated. As suggested by plaintiff's counsel, if the rule be adhered to, all that the one who commits an injury to land, whether negligently or willfully, has to do in order to escape liability, is to depart from the State where the tort was committed, and restrain from returning. In such case the owner of the land is absolutely remediless. We recognize the respect due to judicial precedents, and the authority of the doctrine of *stare decisis;* but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations.

It is suggested that the statutes of this State, in conformity to the old rule, make actions or injuries to real property local. Gen. St. 1894, §§ 5182, 5183. This is true, and, strangely enough, in 1885, the legislature went so far as to provide that, if the county designated in the complaint is not the proper one, the court should have no jurisdiction of the action. But this statute has no application to causes of action arising out of the State. While it settles the rule, and indicates the policy of this State as to actions for injuries to real property within the State, we do not think it ought to have any weight in determining what the rule should be as to causes of action arising out of the State, which can have no local venue here under the provisions of the statute. It does not appear whether the plaintiff lives in this State or in Wisconsin, but this is immaterial, for the place of his residence cannot affect the nature of the action. It is also true that in this particular case jurisdiction of the defendant could be obtained in Wisconsin, but this fact is likewise immaterial, and for the same reason. Order reversed.

NOTE.—*Local and Transitory Actions—Distinction as to Venue.*—By the common law, personal actions, being transitory, may be brought in any place where the party defendant may be found; real actions must be brought in the *forum rei sitæ*; actions for trespasses and injuries to real property are also local and will not lie elsewhere than in the place *rei sitæ*. Story on Confl. L. 551; South Africa Co. v. Companhia De Mocambique (1893), App. Cas. 602. At common law venue was transitory when the cause of action might have happened in any county; it was local when it could happen in one county only. An assault could happen in any place. The entry upon land could only happen where the land lay. The place of trial in the latter case, therefore, was fixed by the very nature of the injury complained of. 1 Chitty on Plead. 271; Gould on Plead. 105, 106, 107; Bouvier's L. Dict.; Rafael v. Verelst, 2 W. Bl. 1055; Doulson v. Matthews, 4 Term R. 503; Shelling v. Farmer, 1 Strange, 646; McKenna v. Fisk, 1 How. (U. S.) 241; Hurd v. Miller, 1 Hilton (N. Y.), 540. Transitory actions are actions the cause of which may arise in any place or county as well as another. 1 Chitty on Plead. 243; Rogers v. Woodbury, 15 Pick. (Mass.) 156.

Originally it was necessary to state truly the venue of every fact in issue, whether those on which the plaintiff relied, or any matter stated by way of defense; and if the places were different, each issue would be tried by a jury summoned from the place in which the facts in dispute were stated to have arisen. After the statute, 17 Car. 2, ch. 8, the practice arose, which ultimately became regular and uniform, of trying all the issues by a jury of the venue laid in the action, even though some of the facts were laid elsewhere. When juries ceased to be drawn from the particular town, parish or hamlet where the fact took place, that is, from among those who were supposed to be informed of the circum-

stances, and came to be drawn from the body of the county generally, and to be bound to determine the issues judicially after hearing witnesses, the law began to discriminate between cases in which the truth of the venue was material and those in which it was not so. This gave rise to the distinction between transitory and local actions, that is, between those in which the facts relied on as the foundation of the plaintiff's case, have no necessary connection with a particular locality and those in which there is such a connection. In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay it in any county he pleased. It was, however, still necessary to lay every local fact with its true venue on peril of a variance if it should be brought in issues.

It was a principle of pleading well understood and vigorously enforced, that a traverse must not be taken on an immaterial point. When, therefore, the actual place of a debt or contract was alleged to some place in England, though contrary to the fact, the defendant was not at liberty to deny that the place alleged was in England, since in such matters the place was immaterial. But whenever the place was material, as all the authorities hold that it was in all controversies relating to land, the defendant might traverse the place, and, even if he did not, if it appeared in proof that the place was out of England, the plaintiff was non-suited. The courts would not take jurisdiction of actions of trespass *quare clausum fregit* abroad or out of England.

Doctrine of the Principal Case.—The doctrine of the principle case is not supported by authority. The only case cited in point is Mostyn v. Fabrias, 1 Cowp. 161, 2 Smith's Lead. Cas. Eq. 916. This case has been repudiated by every English case, touching this matter, which has been rendered since that doctrine was announced. The English decision was given in an action for a personal wrong, which is transitory. It is, therefore, not authority, and the decision as to transitory actions in trespass to lands abroad is *obiter dictum*. Lord Mansfield cites two cases in this decision as supporting his doctrine, but these were decided at *nisi prius*. In a subsequent case, Doulson v. Matthews, these two decisions are expressly referred to and overruled, and the general doctrine affirmed. 4 Term R. 503. In this case Buller, J., said: "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." Lord Herschell, L. C., indorses this language in South Africa Co. v. Companhia De Mocambique (1893), App. Cas. 602, 621.

In Ohio, the common law doctrine has been abolished. Genin v. Grier, 10 Ohio, 209; as to the law in Virginia, seePayne v. Britton, 6 Rand. (Va.) 105. In Massachusetts the common law doctrine is modified as to trustee process. Pub. Stat. ch. 183, §§ 1 and 3; Way v. Dame, 11 Allen, 357; Wilder v. Bailey, 3 Mass. 289. It is believed no American case can be found that supports the doctrine of the principal case. Mitchell, J., in the principal case, says, in reference to the law now in England: "As the distinction between local and transitory venue was abolished by the judicature acts of 1873, we infer that actions for injuries to lands lying abroad may now be maintained in England." This language is *mal a propos*; for, in 1893, it was decided by the House of Lords that the English courts have no jurisdiction to entertain actions to recover damages for a trespass to lands situated abroad, and that the rules of procedure under the judicature acts with regard to local venue did not confer new jurisdiction. British South Africa Co. v. Mocambique (1893), App. Cas. 602, reversing the decision of the court of appeals (1892), 2 Q. B. 358, and the *dictum* of Whitaker v. Forbes, L. R. 10 C. P. 583. The true construction of the judicature acts is that they confer no new rights; they only confirm the rights which previously were found to be existing in the courts either of law or equity. Britain v. Rossitee, 11 Q. B. Div. 129.

In the principal case a railroad company is made defendant in Minnesota, in a suit for injury to real property in Wisconsin. On the same principle a man might be tried in Minnesota for a murder he committed in Wisconsin.

The General Rule.—The rule adopted by the principal case is not supported by English or American authority. It is held by all the courts that trespass *quare clausum fregit* is a local action, and that the courts of one State or country have no jurisdiction of actions of trespass upon land in another State or country, as is clearly stated in the dissenting opinion. Niles v. Howe, 57 Vt. 388; Shelling v. Farmer, 1 Strange, 646; Doulson v. Matthews, 4 Term R. 503; Watts v. Waddle, 6 Pet. (U. S.) 389; Rex v. Johnson, 6 East, 508; Foster v. Vassall, 3 Atk. 589; Story on Confl. L. 448, 453; 2 Kent's Com., 463; 3 Bl. Com. 294, 384; Co. Litt. 282*a*; Rafael v. Verelst, 2 W. Bl. 1055; McKenna v. Fisk, 1 How. (U. S.) 241; Hurd v. Miller, 1 Hilton (N. Y.), 540; Allin v. Conn. River Lum. Co., 150 Mass. 560; British South Africa Co. v. Companhia De Mocambique (1893), App. Cas. 602; Bettys v. Railroad Co., 37 Wis. 323; Briggs v. Bank, 5 Mass. 362; Rogers v. Woodbury, 15 Pick. (Mass.) 156; Clark v. Scudder, 6 Gray (Mass.), 122; Watts v. Kinney, 6 Hill (N. Y.), 82; Sentenis v. Ladew, 140 N. Y. 463; American Union Tel. Co. v. Middleton, 80 N. Y. 408; Cragin v. Lovell, 88 N. Y. 258; Dodge v. Colby, 108 N. Y. 445; Du Brenil v. Pennsylvania Co., 130 Ind. 137; Eachus v. Trustees, etc. Co., 17 Ill. 35; Champion v. Doghty, 18 N. J. L. 3; Indiana, etc. Co. v. Foster, 107 Ind. 430; Ham v. Rogers, 6 Black. (Ind.) 559; Bennett v. McIntire, 121 Ind. 231; Taylor v. Cole, 3 Term R. 292; Livingston v. Jefferson, 1 Brock. C. C. 203; Cooley on Torts, 471.

Actions affecting real property and crimes are strictly local and never transitory. Dowdale's Case, 6 Rep. 47*b*; Sadock v. Briton, Yelv. 202; Ward's Case, Latch. 4; Jennings v. Hankyn, Carth. 11; Ilderton v. Ilderton, 2 H. Bl. 145; Skinner v. East India Co., 6 State Trials, 710; Shelling v. Farmer, 1 Strange, 646; Rafael v. Verelst, 2 W. Bl. 1055; Doulson v. Matthews, 4 Term R. 503; London v. Cox, L. R. 2 H. L. 239; Phillips v. Eyre, L. R. 6 Q. B. 1; White v. Sanborn, 6 N. H. 220.

Application of Statute.—The statutes, generally make no distinction between trespass to lands without and within a State. And there is no reason for holding that the statute renders an action for trespass to lands outside of the State transitory which does not apply to an action for trespass to lands inside the State. Allin v. Conn. River L. Co., 150 Mass. 560, 562. The principal case enunciated a doctrine that the action of trespass *quare clausum fregit* is changed when the land lies without the State from a local to a transitory action, and that the Minnesota statute does not apply, which is not sustained by precedent or by reason.

Waiver of Personal Rights.—It is the law that ac-

tions for injuries to real property must be brought in the *forum rei sitæ*, as illustrated by authority already cited. But a party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and having once done so he cannot subsequently invoke its protection. Embury v. Conner, 3 N. Y. 511; *In re* Cooper, 93 N. Y. 507; Lee v. Tillotson, 24 Wend. (N. Y.) 337. And so where the plaintiff brings suit in one State for injury to real property which lies in another State, and the court acquires jurisdiction of the parties, and the defendant appears, answers and goes to trial without objecting to the authority of the court to hear the cause, the judgment rendered therein will be neither void nor voidable for want of jurisdiction, but will be binding and conclusive upon the parties. Sentenis v. Ladew, 140 N. Y. 463. If the defendant would avail himself of his right, he must raise the question in an appropriate manner before trial. American Union Tel. Co. v. Middleton, 80 N. Y. 408; Cragin v. Lowell, 88 N. Y. 258; Dodge v. Colby, 108 N. Y. 445.

Bloomington, Ill. D. H. PINGREY.

CORRESPONDENCE.

RIGHTS OF INFANTS IN INDIANA.

To the Editor of the Central Law Journal:

Replying to the inquiry of "P A" in your issue of the 7th inst., the child, in my judgment, is not, in the case stated, a tenant in common with the present occupants of the property. The actual entry into possession of land by a purchaser thereof, under a deed, which in terms conveys the entire title to him in fee-simple, although it actually vests only the title to an undivided interest in the premises, is not an entry by such purchaser as tenant in common, but as owner in fee in severalty of the entire premises so conveyed to him. Such an entry is an ouster of all persons who claim an interest in the land at and from the time when they have a right of entry. Elder v. McClaskey, 70 Fed. Rep. 529; Nelson v. Davis, 35 Ind. 474, 482; Barnes v. Born, 133 Ind. 169. This is the settled law of New York (9 Cow. 530; 13 Johns. 406; 71 N. Y. 189), New Jersey (41 N. J. L. 527; 39 N. J. Eq. 62), Maryland (68 Md. 133), Tennessee (2 Head. 674), Michigan (40 Mich. 14, 18), Pennsylvania (13 S. & R. 356), Illinois (118 Ill. 503; 100 Ill. 581), Minnesota (45 Minn. 545), Iowa (51 Iowa, 353), Kansas (32 Kas. 376), California (70 Cal. 350; 91 Cal. 170), Nevada (16 Nev. 260), Kentucky (8 B. Mon. 177; 85 Ky. 155), Georgia (46 Ga. 9; 47 Ga. 674), South Carolina (3 Strob. [Law] 498), Alabama (15 Ala. 363), Texas (26 S. W. Rep. 754; 27 S. W. Rep. 190), Connecticut (3 Conn. 191), Maine (13 Maine, 337), New Hampshire (24 N. H. 54), Ohio (36 Ohio St. 232; 41 Ohio St. 81.) Therefore, unless the rights of the child are saved by the disability of infancy or coverture the statute of limitations is a bar.

J. C. H.

BOOK REVIEWS.

BUMP ON FRAUDULENT CONVEYANCES.

The first edition of this valuable work made its appearance in 1872. Since that time it has had three editions, the present being the fourth edition. Of a work so well and favorably known to the profession it seems almost unnecessary to do more than call attention to this edition and to state the fact that much new and valuable matter and many new cases have been added by the editor, Mr. James McIlvaine Gray. All the leading cases on the subject, both American and English, have been cited. The subject of the work gives it a special and practical value to the practitioner. It may also be said that it is the most extensive and useful treatise on the subject of conveyances made by debtors to defraud creditors. It is written in clear and admirable style, contains exhaustive notes, is well prepared in a mechanical point of view, contains nearly seven hundred pages and is published by W. H. Lowdermilk & Co., Washington, D. C.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Authority to Mortgage Estate.—An order directing an administrator to mortgage decedent's lands entered upon a petition for the sale of the lands to pay debts, is invalid, in default of notice to the widow and heirs.—EDWARDS v. BAKER, Ind., 44 N. E. Rep. 467.

2. ADMINISTRATION—Set-off.—S, an administrator in Vermont, manufactured lumber from logs, etc., which were in deceased's mill yard when he died, and sold and delivered the lumber in Vermont to W, a resident of Massachusetts. W refused to pay for the lumber, claiming the right to set-off a debt due him from deceased, and S sued him in the latter State for the price, and recovered judgment in his own name. The estate was insolvent, but W had no notice of the fact until his claim was barred: Held, that a public administrator appointed in Massachusetts could not maintain a bill in such State against S and W to enjoin payment of the judgment to S, and to compel payment to plaintiff of the amount due on it, to be applied on the debt due W, the estate being in process of settlement in Vermont.—SAWYER v. SEAVER, Mass., 44 N. E. Rep. 505.

3. ADMINISTRATION—Settlements and Accounting.—Where an administratrix has, by mistake, charged herself in her final account with the amount of certain notes, *prima facie* the property of intestate, but in fact belonging to the administratrix individually, the account may be amended by allowing her to credit herself with the amount so charged.—MCGINTY v. MCGINTY, R. I., 34 Atl. Rep. 1114.

4. ADVERSE POSSESSION—Evidence.—In an action to recover land to which defendants claimed title by adverse possession, a refusal to direct a verdict for plaintiff was proper, there being evidence that defendants and their predecessors claimed to be the owners, and exercised acts of ownership by driving stakes to mark boundaries, by fishing, hunting, and trapping, by leasing to others, by the erection of signs warning off trespassers, and by building a dike around the land.—CHABERT v. RUSSELL, Mich., 67 N. W. Rep. 902.

5. APPEAL—Finding of Facts by Appellate Court.—Under Rev. St. ch. 110, § 87 (2 Starr & C. 1842), providing that a judgment of the appellate court shall be conclusive as to all matters of fact, a finding that the engineer of a train was a fellow-servant of deceased, for whose negligence defendant company was not liable, is a finding of fact, which cannot be reviewed.—LEEPER v. TERRE HAUTE & I. R. CO., Ill., 44 N. E. Rep. 492.

6. APPEAL—Parties.—An appeal which fails to make parties all of the parties to the judgment will be dismissed.—MOORE v. FRANKLIN, Ind., 44 N. E. Rep. 459.

7. ARREST—Capias ad Respondendum.—The voluntary discharge by plaintiff of defendant from arrest on *capias ad respondendum* does not exempt defendant from a second arrest in another action for the same cause, where the second arrest is not made maliciously, or with a view to harass the defendant.—BRECKON v. OTTAWA CIRCUIT JUDGE, Mich., 67 N. W. Rep. 906.

8. ASSIGNMENTS FOR CREDITORS—Powers of Assignee.—An assignee for the benefit of creditors, except as his right and powers are regulated by statute, is trustee of the property assigned only to the extent of the assignor's interest therein, and can assert only such rights in regard thereto as to the assignor himself could maintain. He does not represent the creditors, and cannot assert their equities.—GOFF v. KELLY, U. S. D. C. (Mont.), 74 Fed. Rep. 327.

9. ASSUMPSIT.—Two partners in the hotel business agreed to dissolve and submit all matters to arbitration. While proceedings were pending, plaintiff executed to defendant a bill of sale of certain personal property in the hotel, the bill of sale stating that it was subject to the submission for arbitration: Held, that on failure of the arbitrators to agree, plaintiff could not maintain *assumpsit* against defendant on the bill of sale.—NORTON v. HAYDEN, Mich., 67 N. W. Rep. 909.

10. ATTACHING CREDITOR — Intervention.—A simple contract creditor of the defendant in a suit for the foreclosure of a mortgage, who has commenced an action at law against such defendant, and attached the equity of redemption in the mortgaged property, cannot be allowed to intervene, and defend the foreclosure suit.—LOMBARD INV. CO. v. SEABOARD MANUF'G CO., U. S. C. C. (Ala.), 74 Fed. Rep. 325.

11. ATTACHMENT—Bond.—An order refusing to set aside proceedings under a writ of attachment "continues a provisional remedy," within Laws 1895, ch. 212, § 1, subd. 3, granting appeals from such orders. Rev. St. § 2732, providing that before a writ of attachment shall issue "a written undertaking on the part of the plaintiff, with sufficient surety, shall be delivered to the officer, etc., does not require plaintiff himself to sign the instrument.—SHAKMAN v. KOCH, Wis., 67 N. W. Rep. 925.

12. ATTACHMENT—Prior Unrecorded Deed.—The lien of an attachment has precedence over a prior unrecorded deed of the attachment defendant, under Gen. St. 215, declaring that conveyances of real estate, after the filing thereof the record, and not before, shall take effect as to subsequent *bona fide* purchasers, and incumbrancers by mortgage; judgment, or otherwise, not having notice thereof.—WAHRENBERGER v. WAID, Colo., 45 Pac. Rep. 518.

13. ATTACHMENT—Property Subject.—Rev. St. 1895, art. 200, provides that writs of attachment may be levied on such property as is subject to levy on execution. Article 2375 provides that, when a sale on execution has been made, and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the "right title, interest, and claim" which the defendant in execution had in and to the property sold: Held that, where the absolute title to land, the purchase price for which had been paid by several persons, was conveyed to one person, to be resold by him, and the proceeds divided among those furnishing the purchase price, the equitable interest of such persons was not attachable.—CHASE v. YORK COUNTY SAV. BANK, Tex., 36 S. W. Rep. 407.

14. ATTACHMENT — Wrongful Levy — Destruction of Property. — Where an attachment is levied on the property of a third person under the mistaken belief that it belongs to the defendant in the attachment suit, the title of the owner is not thereby changed, unless he treat the property as abandoned to the officer or attaching creditor, and sue for its conversion.—SAMMIS v. SLY, Ohio, 44 N. E. Rep. 508.

15. BENEFIT SOCIETIES—Designation of Beneficiaries.—Where the declared object of an unincorporated fraternal insurance association is to secure a provision for the families of deceased members, but the rules adopted for its government contain no restriction upon the right to designate as beneficiary one who is not included in the particular class of persons for whose benefit the association is formed, and a son-in-law of a member is designated as a beneficiary, who thereafter pays all assessments levied against such membership, held, that such designation is not void as being in contravention of the public policy of this State.—DERRINGTON v. CONRAD, Kan., 45 Pac. Rep. 458.

16. CARRIERS — Passenger—Conduct of Fellow Passenger.—A carrier of passengers has power, and it is its duty, to refuse to receive or to convey, as a passenger, one whose conduct is such as to lead a reasonably prudent person to anticipate that his presence will endanger the safety, or interfere with the convenience or reasonable comfort of the other passengers, but it has no right to eject a passenger who, though intoxicated, conducts himself in a proper manner, and it is not liable for an injury to another passenger which it could not reasonably anticipate.—GALVESTON, ETC. RY. CO. v. LONG, Tex., 36 S. W. Rep. 485.

17. CARRIERS OF PASSENGERS—Electric Railway.—A passenger on an electric railway car, who had frequently ridden over the line, in violation of a notice of warning conspicuously posted at each end of the car, stepped on the footboard while the car was in motion, and in preparing to alight struck against an iron post supporting the electric wires, standing seven inches from the footboard, and was killed: Held, that he was guilty of negligence precluding a recovery of damages for his death, and where such facts appeared from the undisputed testimony it was not error for the court to so rule as a matter of law.—STATE v. LAKE ROLAND EL. RY. CO., Md., 34 Atl. Rep. 1130.

18. CARRIERS OF PASSENGERS—Negligence.—Servants of an electric street railway company are bound to know the difficulty of contolling a car when there is snow on the rails; and where, at such a time, they approach a heavy down grade at such unusual speed as to cause their car to slide down the track, though the brakes are properly set, the company is liable for injuries to a passenger.—DANVILLE STREET CAR CO. v. PAYNE, Va., 24 S. E. Rep. 904.

19. CONSTITUTIONAL LAW—Construction of Statutes.—A statute will not be declared unconstitutional solely on the ground of unjust and oppressive provisions, o

because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed by the constitution.—STATE v. GERHARDT, Ind., 44 N. E. Rep. 469.

20. CONSTITUTIONAL LAW—Highway Bridges.—Highway bridges, as well as the highways of which they are a part, are general subjects of legislation, within the meaning of the constitution.—STATE v. DAVIS, Ohio, 44 N. E. Rep. 511.

21. CONTRACT—Building Contract—Bond for Performance.—Sureties on a contractor's bond conditioned on the principal's faithful performance of a building contract, which provides that the consideration is to be paid to the principal at times therein specified as the work progresses, are released from all liability on the bond, if the payments are made before they are due by the terms of the contract.—BACKUS v. ARCHER, Mich., 67 N. W. Rep. 913.

22. CONTRACT IN RESTRAINT OF TRADE—Limitations.—A right of action for violation of an oral contract to cease selling buggies in a particular county accrues on the first breach, and is barred by five years' limitations provided by Gen. Stat., ch. 71, art. 3, § 2.—DAVIS v. BROWN, Ky., 36 S. W. Rep. 534.

23. CONTRACTS — By what Law Governed. — A note given for a loan and a deed of trust to secure it were executed in Tennessee, and the note expressly made payable there, where the payee lived and the loan was negotiated. The makers lived in Mississippi, and the note was dated there: Held, that it was a Tennessee contract, and governed by its usury laws.—ARMISTEAD v. BLYTHE, Miss., 20 South. Rep. 298.

24. CONTRACTS—Validity—Public Policy.—A stipulation in a contract for the sale of goods to defendant that defendant would not sell or be interested in any goods of the same kind not manufactured by plaintiff does not render the contract void as against public policy.—FUQUA v. PABST BREWING CO., Tex., 36 S. W. Rep. 479.

25. CORPORATIONS — Failure to Subscribe Capital Stock.—Under Comp. Laws, § 2905, providing that upon the filing of articles of incorporation the secretary of State shall issue a certificate reciting that the articles containing the required statement of facts have been filed, and that thereupon the persons signing such articles shall be a body corporate, it is not necessary that any of the capital stock of such corporation shall have been actually subscribed or paid in at the time the articles were filed, and the failure to subscribe or pay in such capital stock is not a fraud on the part of the incorporators for which they can be held liable.—SINGER MANUF'G CO. v. PECK, S. Dak., 67 N. W. Rep. 947.

26. CORPORATIONS — Incorporated Driving Club. — Where the purposes of an incorporated driving club are to promote social intercourse among its members, provide the conveniences of a clubhouse, pleasure grounds, and proper facilities for improving, training and exhibiting horses at meetings to be held at stated times, such purposes are lawful.—DETROIT DRIVING CLUB v. FITZGERALD, Mich., 67 N. W. Rep. 899.

27. CORPORATIONS—Increasing Capital Stock.—An incorporated chamber of commerce may amend its articles of association, increasing its capital stock, by filing the amended articles with the secretary of State, as provided for by How. Ann. St. § 4866.—DETROIT CHAMBER OF COMMERCE v. SECRETARY OF STATE, Mich., 67 N. W. Rep. 897.

28. CORPORATIONS—Stock—Indorsement and Delivery of Certificate.—Where a stockholder caused a certificate of stock to be issued to a person who had not subscribed, in order to give him an opportunity to purchase if he so desired, a retransfer of the shares by him on his refusal to accept them was not a sale, within a by-law providing that a stockholder should give notice of his intention to sell, in order that the other stockholders might have the option to purchase at the price named.—VICTOR G. BLOEDE CO. OF BALTIMORE CITY v. BLOEDE, Md., 34 Atl. Rep. 1127.

29. CORPORATIONS—Ultra Vires—Executory Contract.—In an action brought by a corporation for the breach of an executory contract, the defendant can set up as a defense the want of authority of the plaintiff, under its charter, to enter into such contract.—SAFETY INSULATED WIRE & CABLE CO. v. MAYOR, ETC., OF BALTIMORE, U. S. C. C. of App., 74 Fed. Rep. 363.

30. COUNTIES—Limit of Indebtedness. — The limitation of indebtedness imposed by Const. art. 16, §§ 3, 4, providing that no county shall create any indebtedness exceeding 2 per cent. on the assessed value of taxable property, and that no debt in excess of the taxes for the current year shall be created by any county except by vote of the people, applies to all debts of the county, whether compulsory obligations imposed by law for salaries or bounties or voluntary obligations entered into for any purpose.—GRAND ISLAND & N. W. R. CO. v. BAKER, Wyo., 45 Pac. Rep. 494.

31. COUNTIES—Municipality.—A county is a municipality, within Laws 1895, ch. 138, which creates a State home for feeble-minded persons, and (section 2) authorizes "municipalities" of the State to make donations therein mentioned, for its establishment.—LUND v. CHIPPEWA COUNTY, Wis., 67 N. W. Rep. 927.

32. COUNTY COURT—Minutes.—Gen. St. ch. 28, art. 17, §§ 6, 7, providing that, before every adjournment of the county court, the minutes of the proceedings shall be publicly read by the clerk, and then signed by the judge, and that no minute or order shall be valid till read and signed, do not require each day's proceedings to be read and signed from day to day, but the entire time the court is in session may be treated as one day, and a single adjourning order be made at the end of that time.—COMMONWEALTH v. HOWARD, Ky., 36 S. W. Rep. 556.

33. CREDITORS' BILL.—A bill by judgment creditors alleging that defendants formed a corporation to which they transferred all their property, and then parceled out the stock to themselves and their wives in order to put the property beyond the reach of their creditors, and praying that the formation of the corporation be declared fraudulent as to them, and the corporation divested of the title acquired to the property, so as to enable plaintiffs to subject it to their judgments, is sufficient.—METCALF v. ARNOLD, Ala., 20 South. Rep. 301.

34. CRIMINAL LAW — Accomplices — Corroboration.—Where the evidence showed that L took an active part in the theft of cattle, having been paid by the sheriff to detect the perpetrators of recent thefts, and that P and G subsequently aided in disposing of the meat, either as *particeps criminis*, or as detectives engaged in ferreting out crime, it was error for the court to restrict an instruction as to the necessity for corroboration of an accomplice's testimony to that given by L, such being equivalent to a charge that P and G were not accomplices.—GUYER v. STATE, Tex., 36 S. W. Rep. 450.

35. CRIMINAL LAW—Aggravated Assault.—If the conduct of the prosecutor toward defendant's sister at the time he was shot by defendant was reasonably calculated to impress the latter with a belief that the parties were engaged, or about to engage, in an act of illicit intercourse, and his passion was thereby aroused to such an extent that he became incapable of cool reflection, the offense would be reduced to aggravated assault.—GARRETT v. STATE, Tex., 36 S. W. Rep. 454.

36. CRIMINAL LAW—Assault.—On the trial of a defendant under an indictment under Rev. Laws, § 791, for shooting a person with a pistol, with intent to commit murder, an instruction that the jury might find the defendant "guilty of assault and battery," or "guilty of an assault," was properly refused; the act of shooting being an essential element of the crime charged, which must be found by the verdict to sustain a conviction.—STATE v. ROBERTSON, La., 20 South. Rep. 296.

37. CRIMINAL LAW— Forgery — Indictment. — An indictment which contains no purport clause, but sets out the forged instrument according to its tenor, with the allegation that defendant made the same without lawful authority, and with intent to defraud, is sufficient and need not charge an intent to defraud a particular person.—HOWARD v. STATE, Tex., 36 S. W. Rep. 475.

38. CRIMINAL LAW—Gaming House—Complaint.—An information charging the offense of being present where gaming implements are found, created by St. 1895, ch. 419, § 9, must allege that the place was unlawfully used as and for a common gaming house.—COMMONWEALTH v. SMITH, Mass., 44 N. E. Rep. 503.

39. CRIMINAL LAW—Indictment—Return into Court. —Where the record shows that the grand jury, as a body, made a report, and returned into open court certain indictments, which were properly indorsed as true bills, and filed and placed on the docket, and that the indictment in the case at issue was properly indorsed and filed, and placed on the docket with other cases returned at the same time, the facts of record are sufficient to authorize the court to amend the record so as show the return of the indictment in such case into open court by the grand jury in a body.—GORE v. PEOPLE, Ill., 44 N. E. Rep. 500.

40. CHATTEL MORTGAGES—Conversion by Prior Mortgagee.—Where the mortgagee, holding a first mortgage, after taking possession of property under his mortgage, sells the same without foreclosure, and at private sale, such sale is a wrongful conversion of the property, and operates to extinguish the lien of the mortgage.—LOVEJOY v. MERCHANTS' STATE BANK, N. Dak., 67 N. W. Rep. 956.

41. CHATTEL MORTGAGES — Sale of Mortgaged Property.—In an action to declare a chattel mortgage satisfied on the ground that the mortgagor had remained in possession and continued to sell goods, it appeared that the mortgage covered certain saloon furniture and fixtures, pool and billiard tables, and the stock of cigars and liquors, without the privilege of selling. It was shown that the stock covered by the mortgage was but of nominal value, and that the sales averaged eight dollars per day: Held, that the evidence was sufficient to justify a finding that the sales were of goods purchased subsequent to the mortgage, and not covered by it.—BANNER CIGAR CO. v. KAMMSCHILLINGER BREWING CO., Ind., 44 N. E. Rep. 455.

42. DEED — Acknowledgment — Registration.—The recordation of a deed of trust is ineffective as constructive notice, where the officer who took the acknowledgment was the trustee in the deed.—NICHOLSON v. GLOUCESTER CHARITY SCHOOL, Va., 24 S. E. Rep. 899.

43. DEED—Description.—A deed by a father to his son, for a nominal consideration, describing the land conveyed as "all my right, title, and interest in the estate of J W B, purchased by me at administrator's sale in behalf of my son," is not bad for want of a sufficient description, as the words "purchased by me at administrator's sale in behalf of my son," will be construed as expressing a motive for the conveyance of all the interest purchased at the sale, and not as limiting the interest conveyed to that purchased in behalf of the son.—VINEYARD v. O'CONNER, Tex., 36 S. W. Rep. 424.

44. DEED — Notice of Unrecorded Mortgage.—The recital in a deed, at the end of the covenant against incumbrances, "except a certain mortgage for $900," is notice to the grantee, and those claiming under him, of such an unrecorded mortgage.—REICHERT v. NEUSER, Wis., 67 N. W. Rep. 939.

45. DEED OF MARRIED WOMAN—Reformation.—Where a statute requires the husband and wife to join in a conveyance of the wife's real estate, equity will not reform a deed signed and acknowledged by both parties, but in which the name of the husband, by mistake of the scrivener, was omitted as grantor.—CANNON v. BEATY, R. I., 34 Atl. Rep. 1111.

46. DEED—Parol Evidence of Consideration.—A deed conveying right of way and depot grounds recited that it was in consideration of a small cash payment and supposed advantages to result to the grantor from the location of the depot: Held that, notwithstanding the consideration so expressed, parol evidence was admissible to show a contract to maintain the depot at a specified place as further consideration for the donation of lands.—MISSOURI, K. & T. RY. CO. OF TEXAS v. DOSS, Tex., 36 S. W. Rep. 497.

47. DIVORCE—Decree for Separation.—A legal separation and maintenance will be decreed a wife where there has been actual violence used toward her by her husband, and it may be reasonably apprehended, from such acts and the character and disposition of the parties, that it will occur again should the wife return.—JAMES v. JAMES, N. J., 34 Atl. Rep. 1089.

48. DIVORCE—Desertion.—Where the parents of the husband with whom the wife is required by the husband to live treat her with cruelty, she is justified in seeking the protection of her friends, without being guilty of deserting her husband, so as to entitle him to a divorce on that ground.—HUTCHINS v. HUTCHINS, Va., 24 S. E. Rep. 903.

49. DETINUE — Plea in Abatement.—An action of detinue may be brought either in the county where the defendant resides, or in the county where the tort was committed; and a plea in abatement which alleges simply that defendant did not reside in the county where the action was brought, without also alleging that the tort was not committed in that county, was fatally defective.—MONTGOMERY IRON WORKS v. EUFAULA OIL & FERTILIZER CO., Ala., 20 South. Rep. 300.

50. EJECTMENT—Evidence.—Where plaintiffs in ejectment claim title through one of several heirs of the original owner, to whom such owner devised it to the exclusion of the other heirs, and the will has been lost, evidence of a witness who has examined the records of the courts where the will would probably be recorded that such records do not contain any record of the will is admissible to account for the non-production of the will or a copy.—ATKINSON v. SMITH, Va., 24 S. E. Rep. 901.

51. ELECTION OF REMEDIES — Mistake.—Where a party who has a choice of two remedies pursues one of them under the mistaken impression that the law affords him no other, and in ignorance of the existence of the other and more advantageous remedy, equity, in the absence of injury to others, or of facts creating an estoppel, may relieve him from the apparent election made under such mistake, and permit him to pursue the more advantageous remedy.—STANDARD OIL CO. OF KY. v. HAWKINS, U. S. C. C. of App., 74 Fed. Rep. 395.

52. EQUITY—Joint Defendants—Dismissal.—It is not error to proceed with a hearing where no motion is made nor cause shown for a continuance. Where a bill is filed against joint defendants, and is taken for confessed against one or more of them for want of appearance, and one or more of the other defendants appear, make defense, and disprove complainant's case, the bill should be dismissed as to all defendants.—AIKEN v. CONNELLY, Va., 24 S. E. Rep. 909.

53. ESTOPPEL — Receiving Benefit of Contract.—One who procured the assignment of claims against a third party, to be paid for when collected, cannot, after judgment has been obtained thereon, and collection made, defend against an action by the assignor on the ground that the claims were invalid.—MCNAMARA v. KEATING, Nev., 45 Pac. Rep. 464.

54. EVIDENCE—Best and Secondary.—Where the addressee of a letter identifies it, and proves its loss, another, who saw it, may testify to its contents without showing that he knew the writer's handwriting.—PAINTER v. LEDYARD, Mich., 67 N. W. Rep. 901.

55. FACTOR'S LIEN—Delivery of Possession.—The lien of a factor is dependent on possession. A delivery of

property to a carrier by the owner, to be shipped to another point, not the place of business of the factor, and the taking by the owner from the carrier of a bill of lading in the name of such factor, and forwarding it to him, are not conclusive on the question of the intent of the owner to deliver possession to the factor, where there are other facts in the case tending to show that it was not the purpose of the owner to surrender possession to the factor, but that the object of shipping in the name of the factor was to obtain the benefit of a through rate, which could not be attained if the shipment was made part of the way in the name of the owner, and thereafter the balance of the distance to the place of business of the factor in his name.—ROSENBAUM v. HAYES, N. Dak., 67 N. W. Rep. 951.

56. JUDGMENTS—Federal Courts.—Where a judgment recovered in a State court against a county is assigned to a citizen of another State, the assignee may sue thereon in the proper federal court, although the original judgment is still in force. The assignee has a right to have judicially determined its right to enforce payment of the indebtedness, and the action is not to be considered as brought merely to vex defendant.—FIRST NAT. BANK OF BUCHANAN COUNTY v. DUEL COUNTY, U. S. C. C. (Neb.), 74 Fed. Rep. 373.

57. FRAUDULENT CONVEYANCES — Gifts.—Defendant, pursuant to the request of his deceased brother, gave to his mother his share as distributee in the personal property of such brother, and the mother received the same in good faith, and without knowledge as to the donor's indebtedness, and without intent to defraud his creditors: Held, that the gift was nevertheless fraudulent in law, and voidable at the instance of such creditors.—NORRIS v. JONES, Va., 24 S. E. Rep. 911.

58. GAMING—Recovery of Money Won.—One who furnishes money to another to bet on the result of an election cannot maintain suit for the winnings.—HELBER v. SCHANTZ, Mich., 67 N. W. Rep. 913.

59. GUARDIAN AND WARD—Power of Guardian to Compromise.—Unless limited by statute, a guardian has authority to compromise and release claims or demands on behalf of his ward, and the ward will be bound thereby, unless done in bad faith and in fraud of his rights.—MANION v. OHIO VAL. RY. CO., Ky., 36 S. W. Rep. 530.

60. INSURANCE — Change of Title.—Where a provisional clause invalidates a policy of insurance if "any change shall take place in the title or possession" of property insured without the consent of the insurer, the assured may show by parol evidence, in an action on the policy, that a nominal warranty deed, executed by him to another, was intended by the parties to it as security for money to be loaned to pay off an existing incumbrance, and that the insured remained in possession of the property, and was the real owner.—GERMAN INS. CO. v. GIBE, Ill., 44 N. E. Rep. 490.

61. INTOXICATING LIQUORS—License—Signature.—Act 1895, § 9 (Laws 1895, p. 248), prohibits the granting of liquor licenses against which a remonstrance "in writing, signed" by a majority of the legal voters of certain county subdivisions, has been filed: Held, that the signature of a remonstrator, in which the Christian name is designated by initials, and the surname written in full, is sufficient.—COLLINS v. MARVEL, Ind., 44 N. E. Rep. 487.

62. INTOXICATING LIQUOR — What Constitutes Sale.—Where defendant delivered liquor to another to be paid for in other liquor at some future time, the transaction was a sale within the law prohibiting the sale of intoxicating liquors within a local option district.—KEATON v. STATE, Tex., 36 S. W. Rep. 440.

63. IRRIGATION—Diversion.—One having senior water rights need not use all the water to which he is entitled, where first used on his lands, but may sell part of the rights, and allow the purchaser to divert water to other lands.—LARIMER & WELD RESERVOIR CO. v. CACHE LA POUDRE IRRIGATING CO., Colo., 45 Pac. Rep. 725.

64. JUDGMENT—Equitable Relief—Garnishment.—In garnishment, judgment was rendered against the garnishee, who attempted to defend on the ground of liability incurred by indorsements for defendant above the amount due the defendant for salary. Subsequently, the defendant being insolvent, the garnishee was compelled to pay the notes, and, also, after the return day of the summons in the garnishment proceedings, voluntarily paid to an assignee of the defendant's salary a sum nearly equal to the amount of the judgment: Held, that the insolvency of the defendant was no ground for equitable relief to the garnishee against the judgment rendered against him as garnishee.—FRANKLIN v. COMMERCIAL BANK OF LYNCHBURG, Va., 24 S. E. Rep. 918.

65. JUSTICES OF THE PEACE—Impeachment of Record.—Mills' Ann. St. § 2787, requiring justices to keep a record of their proceedings, etc., does not constitute a court of a justice of the peace a court of record importing absolute verity to the entries in the docket, but such record may be impeached by parol.—HAMILL v. FERRIER, Colo., 45 Pac. Rep. 522.

66. LIMITATIONS — Actions by Foreign Mutual Fire Companies.—Laws 1893, ch. 298, which provided that all foreign mutual fire insurance companies that had been declared insolvent should collect "all claims due" from policy holders within the State for premiums or assessments within six months after the passage of said act, was not restricted to claims actually payable at that time, so as to become the proper subject of an action, but included claims on then existing premium notes for assessments made and notified after such enactment.—WYMAN v. KIMBERLY-CLARKE CO., Wis., 67 N. W. Rep. 932.

67. MANDAMUS — County Seat.— Where there is no other adequate and speedy remedy to test the validity of an election held to relocate a county seat, *mandamus* to compel the county officers to hold their offices at the legal county seat is the proper remedy to determine whether the county seat has been legally changed.—STATE v. LANGLIE, N. Dak., 67 N. W. Rep. 958.

68. MARRIAGE—License.—A marriage is valid, though the ceremony was performed in a county other than that from which the license issued.—CUMMINGS v. STATE, Tex., 36 S. W. Rep. 442.

69. MASTER AND SERVANT—Injury—Apparent Danger.—If, by the negligence of a master, a servant is placed in a position which appears to him to threaten the loss of his life or his serious injury, and in an effort to save himself he is injured, the master will be liable for the injury, without regard to whether the servant acted as a prudent person might be expected to act under like circumstances.—GULF, C. & S. F. RY. CO. v. KNOTT, Tex., 36 S. W. Rep. 491.

70. MASTER AND SERVANT—Substitution by Employer.—A master cannot escape his liability to his servant for negligence by relegating his employee to the service of another; the servant being continued at his original employment, and no knowledge imparted to him of a change in the relations between him and his master. — MISSOURI, K. & T. RY. CO. OF TEXAS v. FERCH, Tex., 36 S. W. Rep. 487.

71. MASTER AND SERVANT—Vice-principals.—The fact that the engineer, who, together with the brakeman on the train, is under the control of the conductor, gives the signals upon which it becomes the duty of the brakeman to put on the brakes, does not make him the vice-principal of the railroad company within the meaning of Act March 10, 1891, which provides that "all persons engaged in the service of any railway corporation who are intrusted by such corporation with the authority to direct any other employee," are vice-principals of such employer.—TEXAS CENT. RY CO. v. FRAZIER, Tex., 36 S. W. Rep. 433.

72. MECHANIC'S LIEN—Payment.—A landowner executed notes in payment for material used in the erection of a building which showed that they were lien notes. Subsequently he executed other notes, after

the maturity of the first, which referred to the old notes as collateral security for the new, and afterwards executed another note for the full amount of the debt: Held, that the new notes were not necessarily a payment of the lien notes, so as to extinguish the lien as against a subsequent mortgagee.—GILBERT v. MOODY, Ky., 36 S. W. Rep. 523.

73. MORTGAGE—Breach of Covenant to Pay Taxes.—A mortgage contained a covenant by the mortgagor to pay taxes, and a power of sale on default in payment of principal or interest when due, or "in case of non payment of taxes," and provided that in case of such sale the mortgagee should retain "the principal and interest which may then be due, together with costs and charges," etc.; but there was no stipulation that the mortgagee might pay taxes, and recover the amount as part of the mortgage debt, or that the debt should become due on default in payment of taxes: Held, that a mere breach of the covenant to pay taxes gave no right to foreclose.—HELLER v. NEEVES, Wis., 67 N. W. Rep. 923.

74. MORTGAGE—Foreclosure—Notice.—It is not in the power of the legislature to cure by retroactive legislation the defect in foreclosure proceedings arising from the failure to publish the notice of sale for the full period of 42 days, and thus validate the void proceedings.—FINLAYSON v. PETERSON, N. Dak., 67 N. W. Rep. 953.

75. MORTGAGES—Foreclosure—Grantee of Mortgaged Premises.—Where a mortgagor conveys one of several tracts covered by a single mortgage by deed containing a covenant for the assumption of the grantee of the payment of the entire mortgage as part of the consideration, and on foreclosure the proceeds of sale are insufficient to satisfy the mortgage, the said grantee is liable in equity directly to the mortgagee for the deficiency.—GREEN v. STONE, N. J., 34 Atl. Rep. 1099.

76. MUNICIPAL CORPORATION — Defective Sewers. — Evidence that, during an unusual rain storm, the lid of a manhole of a self-cleaning sewer was forced off by the water in the sewer, and that, prior to the day of the storm, there had been the usual slight accumulation of sediment, in the bottom of the sewer, is insufficient to warrant a recovery for damages to private property caused by the escaping sewage, on the grounds that the overflow was caused by defendants' negligence in allowing the sewer to become obstructed by an accumulation of refuse matter, and in failing to remove it when it had, or with reasonable diligence might have had, notice of the obstruction.—MAYOR, ETC., OF BALTIMORE v. SCHNITKER, Md., 34 Atl. Rep. 1132.

77. MUNICIPAL CORPORATIONS—Public Improvements — Estoppel. — Where a property owner, having full knowledge, personally and through his agent, of a proposed street improvement, and of the assessment to defray the cost thereof, allowed the same to be completed without making any objection thereto, the collection of such assessment will not be restrained upon a bill brought several months after such completion, alleging irregularities in the assessment.—FITZHUGH v. CITY OF BAY CITY, Mich., 67 N. W. Rep. 904.

78. MUNICIPAL CORPORATIONS — Refunding Bonds — Constitutional Law.—Under Act March 3, 1877, authorizing the funding of city indebtedness, and providing that, after "funding bonds shall have been issued, no action or proceeding shall be instituted nor any defense to any action interposed by said city, or by any person, the object of which shall be to impair the validity or security or depress the value of said bonds," funding bonds which have passed into the hands of *bona fide* holders are not subject to defense by the city, and therefore are subject to be refunded, irrespective of the validity of the original indebtedness.—MYERS v. CITY OF JEFFERSONVILLE, Ind., 44 N. E. Rep. 452.

79. MUNICIPAL CORPORATIONS — Taxation. — A city whose corporate limits extended to the low-water mark on the Indiana side of the Ohio river authorized a bridge company to construct a bridge across the river, within its limits, with approaches upon its streets. The ordinance provided that the right to levy taxes on the portion of the bridge within the city limits should be reserved: Held, that the city could levy taxes on the entire portion of the bridge within its limits, for ordinary city expenses, including current expense of public schools, and for the payment of interest on water bonds, railroad aid bonds, and school bonds previously issued. — HENDERSON BRIDGE CO. v. CITY OF HENDERSON, Ky., 36 S. W. Rep. 561.

80. MUNICIPAL CORPORATIONS — Taxation — Agricultural Lands.—Agricultural and similar lands brought within the corporate limits of a town by the extension of such limits and receiving the benefits coincident with municipal government, are subject to taxation for municipal purposes, although not strictly urban property, in that the lands are not divided into blocks and lots.—BRIGGS v. TOWN OF RUSSELLVILLE, Ky., 36 S. W. Rep. 558.

81. MUNICIPAL CORPORATIONS — Taxation — Extra Levy.—The charter of the city of Denison (section 118) provides, that the city council may levy a tax of one and a half per cent. on all taxable property, and an additional tax of 1 per cent. for any purpose the accomplishment of which is authorized by the charter, if approved by two-thirds of the tax-paying voters. Under section 46, the council may provide by ordinance for the payment of existing indebtedness, and section 113 gives the council power to appropriate from the general revenue to discharge accrued indebtedness: Held, that the council has no power to levy the extra tax for the payment of a pre-existing debt, and *mandamus* will not lie to compel a submission of an extra tax levy to defray such indebtedness to the taxpayers.—CITY OF DENINSON v. FOSTER, Tex., 36 S. W. Rep. 401.

82. MUNICIPAL CORPORATIONS—Water-works.—A municipal grant of a franchise to a water-works company for a term of years, without receiving bids therefor publicly after due advertisement, as required by Const. § 164, is void.—NICHOLASVILLE WATER CO. v. BOARD OF COUNCILMEN OF TOWN OF NICHOLASVILLE, Ky., 36 S. W. Rep. 549.

83. MUNICIPAL COURTS—Jurisdiction—Constitutional Law.—Under Const. art. 5, § 1, declaring that the "judicial power of this State" shall be vested in certain named courts, "and in such others as may be provided by law," the legislature cannot give a municipal court, created as an incident to a municipal corporation, jurisdiction concurrent with a State court over violations of State Laws.—LEACH v. STATE, Tex., 36 S. W. Rep. 471.

84. MUNICIPAL OFFICERS—Removal by Mayor.—St. § 2794, providing that the mayor may, by a written order, "giving the reasons therefor," remove from office any head of department, director or other officer appointed by him, does not authorize the removal of officers appointed for a fixed term, without notice and opportunity to be heard.—TODD v. DUNLAP, Ky., 36 S. W. Rep. 541.

85. NATIONAL BANKS—Stockholders.—One who knowingly permits his name to be entered, upon the stock books of a national bank, as the owner, individually, of stock therein, cannot be permitted, as against creditors, or a receiver of the bank representing them, to show that he was not the owner of the stock; and he is liable for an assessment thereon, though he held the stock, in fact, as trustee for the bank itself.—LEWIS v. SWITZ, U. S. C. C. (Neb.), 74 Fed. Rep. 381.

86. NATIONAL BANKS — Stockholders — Transfer of Stock.—One C was the holder of stock in the D national bank, and was also an officer of the L bank, which held stock in the D bank. In the latter capacity, he was informed of an urgent demand upon the L bank to send $5,000 by telegraph in aid of the D bank. Within a week after this demand, L transferred his

stock in the D bank, without consideration, to his five children, one of whom was a married woman and two minors. Within five months thereafter, the D bank failed, and an assessment was made on the stockholders: Held, that the transfer must have been made by L, in contemplation of the liability, and that both he and his transferees were liable for the assessment, the latter because the liability was cast upon them by law when they became stockholders.—FOSTER v. LINCOLN, U. S. C. C. (Vt.), 74 Fed. Rep. 382.

87. NEGLIGENCE—Fire Set by Thresher Engine.—In an action to recover damages for the destruction of plaintiff's grain while being threshed by defendant with a steam threshing outfit, defendant's offer to show that improper fuel was furnished by plaintiff for the engine, if admissible under the pleadings, must connect the proposed proof with the fire by further showing that such fuel was more liable than other fuel to communicate fire to the grain.—HOLMAN v. BOSTON LAND & SECURITY CO., Colo., 45 Pac. Rep. 519.

88. NEGOTIABLE INSTRUMENTS—Extension of Time—Sureties.—The surety on a note is not released by the mere promise of the holder, made to the principal maker, without the knowledge or consent of the surety, to give an extension of the time of payment thereof, unless such promise be founded upon a new and sufficient consideration.—EATON v. WHITMORE, Kan., 45 Pac. Rep. 450.

89. NEGOTIABLE INSTRUMENT — Interest.—When a note expressly provides that the principal bears interest at the rate of 7 per cent. from date until paid, and the mortgage securing the same provides that on default of payment of any part of the sum secured, when due, interest shall be paid at the rate of 12 per cent. per annum from the date of the note, the rate of interest recoverable in an action brought on the note and mortgage is controlled by the terms of the note, and is limited to 7 percent. per annum.—NEW ENGLAND MORTGAGE SECURITY CO. v. CASEBIER, Kan., 45 Pac. Rep. 452.

90. NEGOTIABLE INSTRUMENTS—Real Party in Interest.—The indorsee and holder of a negotiable note, which is regularly transferred to him by a written indorsement in full, is vested with the legal title thereto, and may maintain an action thereon against the maker, in his own name, as the real party in interest within the meaning of the Code, no prior holder claiming any interest therein; and it is immaterial, in such case, what may be the equities and relations existing between the indorsee and his indorser as to the proceeds of the note.—LINNEY v. THOMPSON, Kan., 45 Pac. Rep. 456.

91. OFFICERS—Term of Office—Power of Removal.—Under Code Pub. Gen. Laws, art. 23, § 121, providing that the chief officer of the insurance department of the State "shall be appointed by the governor, treasurer, and comptroller, for the term of four years, and shall be known as the insurance commissioner, and shall hold his office during the term for which he is appointed and qualified, unless sooner removed by the governor, treasurer and comptroller," the commissioner, while appointed for a fixed term, holds the position subject to the power of removal vested in the governor, treasurer, and comptroller; and, no causes of removal being specified by the law, as there are in case of many of the civil officers, such power must be held to rest in the discretion of the removing officers; and may be exercised by their unanimous vote, without the preferring of charges or giving of notice to the incumbent.—TOWNSEND v. KURTZ, Md., 34 Atl. Rep. 1123.

92. PARTITION — Deed by Tenants in Common.—A deed by tenants in common which recites that it is made to the grantee "for the sole purpose of dividing the pieces or parcels of land hereinafter described, that deeds may come direct from the party of the second part to the parties of the first part, according to their respective interests," is binding on none of the grantors unless executed by all.—CENTER v. DAVIS, Cal., 45 Pac. Rep. 468.

93. PLEDGE — Rehypothecation by Pledgee.—A rehypothecation of collateral securities by the holder thereof is not a conversion, but such securities remain as collateral so long as they are not sold and passed beyond the pledgor's control.—PACKARD v. DENVER SAV. BANK, Colo., 45 Pac. Rep. 511.

94. PLEDGE—Tender.—A tender to the attorneys of a pledgee of the amount necessary to redeem the pledge, on condition that the pledge be immediately surrendered, is not good, where the party making the tender knows that the attorneys have not the pledge in their possession, and the attorneys are justified in doubting whether the party making the tender is entitled to redeem.—MALONE v. WRIGHT, Tex., 36 S. W. Rep. 420.

95. PRINCIPAL AND SURETY— Action on Bonds.—Where a bond is given for the faithful performance of a contract, the obligee may, on breach thereof, join in one suit the sureties on such bond and the sureties on a subsequent bond executed as additional security for the performance of the same contract.—DEUTSCHMAN v. BATTAILE, Tex., 36 S. W. Rep. 489.

96. PRINCIPAL AND SURETY—Subrogation of Surety.—Under Code, § 527, declaring the bond of a tax collector a lien upon the property of sureties from the date of his default, the sureties, upon payment of a judgment against them for the default of a tax collector, are subrogated to the rights of the county therein, and as against a non-contributing surety acquire a lien for his share superior to any mortgage or other lien of date subsequent to such default.—CUMMINGS v. MAY, Ala., 20 South. Rep. 307.

97. PROCESS—Constructive Service.—Code, art. 16, § 112, providing for constructive service by publication in certain cases, must be strictly complied with; and where a bill was filed against the unknown heirs of the children of B H, deceased, and the order of publication notified and warned the children of A H to appear, the notice was fatally defective.—HARDESTER v. SHARRETTS, Md., 34 Atl. Rep. 1122.

98. PUBLIC LANDS—Entries—Cancellation.—The commissioner of the general land office, after issuance of a final certificate and before issuance of a patent, has authority after hearing, of which the entryman has had due notice, to cancel an entry of public lands allowed by subordinate officials of the department upon fraudulent final proofs.—CALDWELL v. BUSH, Wyo., 45 Pac. Rep. 488.

99. PUBLIC LANDS—State Lands.—Const. art. 14, § 2, providing that land certificates should thereafter be "located, surveyed or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the State," did not inhibit the bringing of a suit by the State against the holder of such title to cancel the same and recover the land; and, when the land is recovered in such a suit, it ceases to belong to the class of prohibited lands, and is again subject to location.—FAULK v. SANDERSON, Tex., 36 S. W. Rep. 403.

100. RAILROAD COMPANY—Street Railroads—Injuries to Passenger.—In an action against a street-railway company for injuries, where the plaintiff testified that his place of business was in the middle of the block below the crossing where he attempted to get off, and that the motorman saw him arise from his seat, and go to the door to get off at the crossing, it was competent to show by the motorman that the plaintiff was in the habit of riding to the middle of the block before getting off, and had several times requested the motorman to slow down, and let him off there.—MCDONALD v. MONTGOMERY ST. RY., Ala., 20 South. Rep. 317.

101. RAILROAD COMPANY—Street Railroads — Negligence.—A street railway company propelling its cars by electricity along the public streets of a city owes a duty to the public which requires it to so regulate the movements of its cars at the intersection of such streets, when receiving or discharging passengers from a standing car, as not to unnecessarily expose

pedestrians to the danger of collision with a passing car on the opposite track.—CONSOLIDATED TRACTION CO. v. SCOTT, N. J., 34 Atl. Rep. 1094.

102. RAILROAD COMPANIES — Injury — Contributory Negligence.—In an action against a railway company for injuries, it appeared that plaintiff, a motorman on an electric street railway, stopped his car about 40 feet from the crossing of defendant's railroad, and looked in both directions, but saw no train. At this point, and up to within 10 feet of the track, a train could have been seen 570 feet distant, in a southeasterly direction. Plaintiff started his car, but did not look again until about 5 feet from the track, when he saw a train coming from the southeast, about 200 feet from him, and his car was struck before it got across the track: Held, that plaintiff was guilty of contributory negligence precluding a recovery.—VREELAND v. CINCINNATI, S. & M. R. CO., Mich., 67 N. W. Rep. 905.

103. RAILROAD COMPANIES — Injuries to Person on Track.—The contributory negligence of a pedestrian, in placing himself in a dangerous position, by walking upon a railway track, will prevent a recovery for his death, caused by being struck by a train, provided those in charge of the train did not actually see his danger, though they could have done so, by the exercise of reasonable diligence, in time to have avoided injury to him.—TEXAS & P. RY. CO. v. BREADOW, Tex., 36 S. W. Rep. 411.

104. RAILROAD COMPANIES—Trespassers—Infants.—A railroad company owes no higher duty to an infant trespassing upon its tracks than to an adult, and is not liable for injuries suffered by such a trespasser, unless, after the discovery of his presence on the track, it has failed to use ordinary care to avoid injuring him.—FELTON v. AUBREY, U. S. C. C. of App., 74 Fed. Rep. 350.

105. RELEASE—Rescission. — Where an employee injured in defendant's service was competent to appreciate and understand the nature and effect of a release of a claim for damages, and no unfair methods were used to induce him to sign the release, the fact that the transaction was unwise on his part is immaterial. —CHESAPEAKE & O. RY. CO. v. MOSBY, Va., 24 S. E. Rep. 916.

106. REMOVAL OF CAUSES — Federal Question. — A cause cannot be removed from a State to a federal court on the ground that it is one arising under the federal constitution or laws, unless the fact is shown by the complaint.—TEXAS & P. RY. CO. v. CAPLES, Tex., 36 S. W. Rep. 516.

107. RES JUDICATA.—A petition for *mandamus* will be examined by the supreme court when presented, and, unless probable grounds for issuance of the writ appear, it will be dismissed without citation. A verdict of a jury, when the time has passed in which the court has power to set it aside, is an adjudication of the facts at issue in the case, and may be pleaded in bar of another suit on the same cause of action, though no judgment has been entered upon it.—HUME v. SCHINTZ, Tex., 36 S. W. Rep. 429.

108. SALES—Description of Goods — Condition Precedent.—In an action for damages for a breach of contract, it appeared that plaintiff had agreed to purchase from defendant all the steel scrap in his shipyard, "consisting of clippings and punchings from the steel plates and angles and beams used in the construction of the United States cruisers" built by defendant. So far as the contract was evidence by writing, there was a sale of goods by specific description. After payment by plaintiff on delivery, it was found that materials of a different character were mingled with the steel scrap, much reducing its value: Held, that the written, specific description was not a warranty, but a condition precedent, that the goods sold should be what they were alleged to be, for a breach of which plaintiff could recover the difference between the price paid and the value of the goods delivered.—COLUMBIAN IRON WORKS & DRYDOCK CO. v. DOUGLAS, Md., 34 Atl. Rep. 1118.

109. TAXATION — Exemption — School Building.—A house owned by a practicing attorney, in which he lives with his wife, she conducting therein a day and boarding school, is not within Rev. St. 1895, art. 5069, exempting from taxation, under authority of Const. art. 8, § 2, "all buildings used exclusively and owned by persons or associations for school purposes."—EDMONDS v. CITY OF SAN ANTONIO, Tex., 36 S. W. Rep. 495.

110. TAXATION—Interstate Commerce—Express Companies.—The tax authorized by the Act of May 10, 1894, is an excise tax, imposed for the privilege of carrying on the express business in this State, and said act is a valid law.—ADAMS EXP. CO. v. STATE, Ohio, 44 N. E. Rep. 506.

111. TROVER—When Lies.—Plaintiff employed defendant as an attorney to bring suit on a claim, and sent a check, payable to defendant's order, to cover disbursements. Defendant cashed the check, but, having induced the debtor to promise payment without suit, used the proceeds for his own purposes: Held, that trover for conversion of the check, or of the proceeds thereof, would not lie.—SHRIMPTON & SONS v. CULVER, Mich., 36 N. W. Rep. 907.

112. TRUST—Resulting Trusts in Lands—Payment of Purchase Money.—Where the purchase price of land is paid by one person, and title taken in the name of another, a resulting trust will be presumed in favor of the one by whom the payment was made; giving him an equitable interest in the lands, which is subject to the lien of a creditor.—THOMPSON v. SANKEY, Pa., 34 Atl. Rep. 1104.

113. VENDOR'S LIEN—Waiver.—The taking of a mortgage on lands, to secure the unpaid purchase money, is an implied waiver of the vendor's lien.—PALMER v. DESLAURIERS, R. I., 34 Atl. Rep. 1108.

114. WATERS — Riparian Rights.—The State has no power to arbitrarily destroy the rights of a riparian owner on a navigable lake without his consent, and without compensation and due process of law, for the sole purpose of benefiting some other riparian owner, or for any other merely private purpose; and hence LAWS 1891, ch. 202, conveying and relinquishing to one R, his heirs and assigns, all its right, title, and interest in and to all lands lying within the limits of Muskego Lake, and authorizing the drainage of such lake without the consent of riparian owners, is void.—PRIEWE v. WISCONSIN STATE LAND & IMPROVEMENT CO., Wis., 67 N. W. Rep. 918.

115. WILLS—Parol Evidence.—Where no ambiguity appears on the face of the will, parol evidence is inadmissible to show that a different meaning was intended by testator from that appearing from the will. —JACKSON v. ALSOP, Conn., 34 Atl. Rep. 1106.

116. WITNESS—Credibility — Impeachment. — Under Code Cr. Proc. 1895, arts. 770, 790, allowing defendant in a criminal case to testify in his own behalf, and providing that a confession made by a defendant while in jail cannot be used against him unless he was duly warned, the State cannot examine a defendant, when a witness in his own behalf, as to a confession made by him while in jail, without being warned, for the purpose of laying a predicate for his impeachment, and then show by witnesses that he made the confession.—MORALES v. STATE, Tex., 36 S. W. Rep. 135.

117. WITNESS — Transactions with Decedent.—Civ. Code, § 606, cl. 2, provides that no person shall testify for himself concerning any transaction with a decedent. Clause 9 provides that the assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another: Held that, as against the administrator of the payee of a note, a person appearing by indorsement on the note to be the assignee of the payee, who has reassigned the note during the life of the payee is incompetent to testify, in favor of his assignee, as to the assignment by the payee to him.—NEALE'S ADM. v. NEALE, Ky., 39 S. W. Rep. 526.